In the Supreme Court of the United States

October Term, 1921.

BRITISH COLUMBIA MILLS, TUG & BARGE COMPANY, LTD., a corporation,

Petitioner,

vs.

A. W. MYLROIE,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Brief of Respondent

STATEMENT OF THE CASE.

This is an action *in rem* by respondent, libellant below, as owner of the American barge BANGOR and lawful bailee of its cargo, against the British tug COMMODORE. The libel alleged the seaworthiness of the barge; that the tug in March,

1917, was engaged in towing the barge, the latter properly following, on a voyage from a point in the waters of the Gulf of Georgia, British Columbia, to Anchorage, Alaska; that the tug, at 2 a. m. of March 27, 1917, being then in Alaskan waters, out of her course, in a heavy wind and sea and snow storm, sighting land, put her wheel hard over and under a full head of steam suddenly changed her course to avoid the reefs and rocks on the shore of Mary Island; that by reason of the sudden strain due to the sudden change of the tug's course, the barge's shackle, a link in the tow line, was broken; and that the barge drifted and grounded on Mary Island, Alaska, with consequent damage to the barge and loss and damage to the cargo, all through the negligence and carelessness and want of skill and knowledge of the waters on the part of those in charge of the tug.

Issue was joined by petitioner, appearing as claimant, by an amended answer, admitting the towage service, denying generally the material allegations of the libel, alleging the towage service was being performed under a written contract containing a clause purporting to exempt petitioner from liability, alleging the unseaworthiness of the barge's shackle; and that by reason of the terms of the con-

tract, the unseaworthiness of the shackle, and want of negligence on the part of the tug, neither petitioner nor its tug was liable for any damage sustained by respondent.

At the trial, the respondent, immediately before resting his case in chief, called, as a witness in his own behalf, the master of the tug, and after interrogating him with respect to the number of the tug's crew and their respective duties, followed by cross-examination by petitioner, orally moved the court for leave to amend his libel so as to allege:

> "That this vessel [the tug] at the inception of the voyage was unseaworthy and that she was improperly and insufficiently manned in that she did not have a sufficient crew to maintain a legal lookout on that vessel during the voyage,"

which leave was thereupon granted by the court, and to which petitioner took exception.

Subsequent to the trial and on December 5, 1917, and ten months prior to the decision of the trial court on the merits, respondent served on petitioner, and filed, an amended libel, duly verified as required by the Admiralty Rules, containing in substance the oral amendment as to the tug's unseaworthiness and other minor changes, alleging the tug was without a lookout at the time of the casualty

and alleging damages to respondent in the sum of $33,562.47.

No exception was taken or objection made by petitioner at any time in either court below, to the amended libel as served and filed.

The Trial Court Found:

1. That the tug did not have on the bow or in the pilot house, any one whose sole duty it was to act as lookout, but it did have an experienced man in the pilot house who testifies that in fact he did keep a *constant* lookout (italics the court's) (Rec. 732):

2. That the absence or inefficiency of such lookout as respondent contended should have been had, did not cause any collision; that whatever the character and situation of the lookout really was, it was good enough to enable the tug to avoid the collision with the island, and it would have enabled the barge likewise to avoid such collision had not the shackle broken (Rec. 732);

3. That the sudden change of course of the tug, alleged by respondent, had not been established by a preponderance of the testimony (Rec. 725);

4. That assuming the tug did hard-a-port im-

mediately before the shackle broke, no whistle was blown by the tug; and that the clear preponderance of the testimony showed it was not usual, customary or necessary for a tug to whistle to its tow when the former contemplated porting its helm (Rec. 725);

5. That the barge did not follow the tug because the shackle broke; that it broke because it was not strong enough to stand the strain; and that negligence could not be ascribed to the tug for its action or non-action at or about the time the shackle broke (Rec. 728);

6. That it was unable to find from a preponderance of the evidence that there was any actionable negligence on the part of the tug (Rec. 734); and dismissed the libel.

Upon a Review by the Appellate Court on Appeal, the Latter Court Found:

1. That the tug did not have a proper lookout (Rec. 761);

2. That want of a proper lookout contributed to the disaster (Rec. 761);

3. That the tug suddenly put her wheel hard-over without warning, resulting in a jerk that broke the tow's shackle, thereby causing her to drift and

resulting in her wreck upon the shore of the island; which was gross negligence (Rec. 762);

4. That the barge's shackle was seaworthy (Rec. 762, 763, 764);

5. That the exemption clause of the towage contract was invalid (Rec. 755, 756, 757);

6. That the tug was unseaworthy for want of sufficient crew to enable it to station a lookout (Rec. 757-762).

The Petitioner Seeks a Review in this Court, Complaining of the Appellate Court:

1. In declaring the exemption clause invalid;

2. In finding the tug unseaworthy;

3. In finding there was negligent or improper performance of lookout duties;

4. In finding the tug guilty of negligence in putting its helm hard-over without warning to the barge.

5. In finding the barge's shackle seaworthy;

And Contending in Its Petition:

That even if the tug were unseaworthy by reason of the inadequacy of the lookout, the contract exempts the tug from damages sustained by the barge.

In support of the findings of the appellate court complained of and in opposition to the contention of petitioner, we respectfully submit the following:

POINTS OF LAW AND FACT.

First. The towage contract.

Second. That the tug was without a proper lookout.

Third. That the want of such a lookout was a contributing cause of the disaster.

Fourth. That the shackle, a part of the barge's equipment, was seaworthy; and the breaking of the shackle was due to the sudden and excessive strain caused by the sudden change of the course of the tug without warning.

Fifth. That there was a want of reasonable care, caution and maritime skill on the part of those in charge of the tug.

Sixth. That the exemption clause of the towage contract is void.

Seventh. That the towage contract never attached.

FIRST POINT.

The Towage Contract.

The contract, dated March 14, 1917, (Rec. 7; petitioner's exhibit 2), is between the petitioner, a corporation of British Columbia, Canada, and the Anchorage Supply Company, of Seattle, in which latter name the respondent, owner of the barge, was conducting a business at Anchorage, Alaska, (Rec. 183).

Negotiations leading up to the contract were had between Captain Bjerre, representing the petitioner, and the respondent, at Seattle (Rec. 144). The written contract was received by respondent at Seattle through the mail on March 15, 1917 (Rec. 143), duly executed by petitioner (Rec. 144) with an accompanying letter from petitioner dated March 14, 1917, (respondent's exhibit F; Rec. 143, 144); and thereupon the contract was executed by respondent as Anchorage Supply Co. and by him mailed to petitioner in his letter, dated March 15, 1917 (petitioner's exhibit 3) to petitioner (Rec. 66).

The amended libel alleges the departure of the barge BANGOR from Seattle March 21, 1917 (Rec. 11); and the amended libel and amended answer allege (Rec. 11 and 7) that on March 22, 1917, upon

the International Boundary Line between the United States and Canada, in the Gulf of Georgia, the barge was picked up and taken in tow by the tug COMMODORE for the voyage to Alaska.

The respondent received petitioner's letter, dated March 22, 1917, (petitioner's exhibit 4) at Seattle in due course of mail (Rec. 67).

The object of this recital is to direct the attention of the court to the sequence of events and to the fact that the barge had departed from Seattle on her voyage and had been picked up in the Gulf of Georgia, about 100 miles from Seattle and taken in tow by the tug at 7:10 p. m. (Rec. 315, 330) the day of the date of petitioner's letter of March 22, 1917 (Petitioner's exhibit 4); and that the letters, Exhibits 3 and 4, have therefore no bearing on the contract.

The contract contained, *inter alia,* the following paragraph:

> 3. That the Tug will render to the said barge "Bangor" reasonable assistance from time to time in any emergency which might arise, and whilst discharging at Anchorage the Tug is to be within call of the Barge at all times to render such reasonable assistance in case of any emergency which may arise. The Tug Company is not to be held liable for any damage which might happen to the said barge "Ban-

gor" or its cargo while in tow or at anchor" (Rec. 8).

SECOND POINT.

The Tug Was Without a Proper Lookout.

The towage contract was for a series of tows during 1917, from a point on the International Boundary Line, between the State of Washington and the Province of British Columbia, Canada, and Anchorage, Alaska.

The route pursued by the tug was what is known as the "inside route," through the waters of British Columbia and southeastern Alaska (including Revillagigedo Channel where the barge was stranded on Mary Island) and out at Cape Spencer (Johnson, Rec. 315), thence across the Gulf of Alaska to Anchorage, at the head of Cook Inlet, a distance of 1750 miles, the larger part of which is in Alaskan waters (3500 miles round trip; Rec. 424, 727). The distance between the southern point of departure and Cape Spencer, through southeastern Alaskan waters, is approximately one thousand miles and that part of the route is through many long, narrow, tortuous passages, "themselves none too easy" (Opinion of trial court, Rec. 727); and thence, passing out at Cape Spencer, "up through the Gulf of Alaska, one

ofthe most turbulent stretches of water in the world, ou into the ocean and up into Cook Inlet" (Id. Re. 727 and Rec. 760). Route very crooked (Bjerre, Re. 253).

The Facts as Disclosed by the Record:

(1) *The Crew of the Tug:* Thirteen in all; tw engineers; two firemen; two coal-passers; one cok; three deck-hands; mate; pilot, on the articles as purser (Rec. 231) but acting as pilot; and master. Mte and master standing watch and watch on the brlge; two of the three deck-hands, as helmsmen stading watch and watch, the third deck-hand, the "dy man"; men in the engine-room, and the cook coined to their respective departments; the deck-had, who was the "day man," walked around deck alllay and slept at night "unless we called him or sorthing else" (Johnson, master of tug, as witness forespondent (Rec. 207, 208, 209) (Croft, Rec. 69, 79)0).

(2) *The Lookout and His Station:* Petitioner's evence is to the effect:

Master, mate and pilot, were all on the lookout in heelho se, with no lookout between wheelhouse anthe stem of the tug (40 feet between pilot house anstem, Rec. 204, 261; Rec. 204); (Bjerre, Rec.

299); no obstacle between wheelhouse and stem, nothing to obscure sight or prevent sound; windows of pilot house all open; they were laying out through them, could discern objects and hear sounds better from wheelhouse than any other part of ship (Johnson, master, Rec. 204, 205); that as master he was on watch in charge of navigation of tug from 6 p. m. until after the accident (1:45 a. m. following morning) (Id. Rec. 317); while pilot was laying out course at one o'clock (a. m.), he was laying out of the window (Id. Rec. 342); master and pilot studied over chart together (Rec. 341; assisting each other (Rec. 342).

The pilot was in pilot house helping master then keeping a lookout towards Mary Island Light (Bjerre, pilot, Rec. 232); stayed in wheelhouse at that time (passing Tree Point), keeping a sharp lookout along with the master; "we were keeping a sharp lookout at the same time for Whale Rocks and Black Rocks" (Id. Rec. 233); pilot presumed he saw the island as soon as it was visible to the eye from tug; he was keeping a very close lookout (Id. Rec. 234); was looking out of starboard window at time of sighting the little island, with master at port window (Id. Rec. 235); at 1:00 a. m., time of slowing down and changing course, had his head

out of window (Id. Rec. 268); that the mate left the pilot house to go to towing machine, a good half hour before shackle broke (Id. Rec. 236); pilot was there to keep a lookout and give master of tug all the help he could in taking care of the vessel and the tow (Id. Rec. 261); * * * was interested in vessel and her welfare (Rec. 261); windows of pilot house all open, pilot hanging out of window (Id. Rec. 250); from Tree Point until small island sighted, kept a very sharp lookout (Id. Rec. 257); *witness* (Bjerre, the pilot) *had no watch that night* (Id Rec. 260); pilot and master were the only lookouts, Dawe was in pilot house part of time after 12 o'clock (midnight)—not very long (Id. Rec. 286, 287).

The mate testified that the pilot was keeping a sharp lookout all the time witness was in pilot house (Dawe, Rec. 390).

Petitioner attempted to show:

That the custom in those waters is to keep a lookout in the pilot house, lookout stationed in wheelhouse rather than at stem because stem wouldn't be any good, lookout can best see and hear from pilot house (Johnson, Rec. 324, 325); that the most appropriate place for lookout on that tug was

in pilot house, that applied to tugs generally; that is the custom because vision is clear there, detects sound better (Bjerre, Rec. 262); and to same effect Dawe as to custom in waters of British Columbia (Rec. 385, 386, 391); that the officer of the tug is the lookout (Capt. Harriman, Rec. 468); that the officer in command is the bridge officer and lookout, discharging both duties, that is the custom (Capt. H. R. Smith, Rec. 247); *unless in very thick weather when they put him on the forecastle head, that is the invariable rule;* if the wheelhouse is in excess of thirty feet from the stem, would not say proper position of lookout is in wheelhouse (Capt. Snoddy, Rec. 656, 663); I have a lookout on the forecastle head (Capt. Nielsen, Rec. 682); proper place for lookout on tow-boats, in the pilot house (Capt. H. R. Smith, Rec. 242); but: "That stands to reason—the closer you get to the stem—the better you might be able to see" (Id. 248).

Respondent's testimony:

Croft, helmsman of the tug on watch in the pilot house at the time the shackle carried away, the only person on the tug, excepting Johnson, Bjerre and Dawe, who had any knowledge of the whereabouts of the master, pilot and mate at that time, testified that at the time the shackle carried away and for some

time prior thereto, Johnson, master, was not in the pilot house (Rec. 73, 75, 79, 80, 82); that Johnson came in after that (Rec. 75); that he, witness, and Bjerre were there, and that Dawe, the mate, who had previously on that watch been ordered by Capt. Bjerre to go outside of the pilot house and lookout (Rec. 81) was there, came in just about that time (Rec. 73, 79, 80, 81, 82).

As said elsewhere in this brief, the trial court who saw and heard Croft testify on the witness stand, said that *Croft "impressed me as an honest man and I have no doubt that he was testifying according to his best recollection"* (Rec. 725).

The appellate court found that Johnson was not in the pilot house when the shackle carried away and that Bjerre was there directing the movement of the tug. (Rec. 761).

The functions of the bridge officer or the pilot in directing the movement of the vessel are, among other things, first, to determine the proper course for the vessel to pursue, then to give that course to the helmsman, to see that the helmsman heads the vessel on the course determined, to see that he keeps it so headed, and to direct him to port or starboard the wheel a little, from time to time, with-

out changing the designated course, to "ease up" or to "steady" as occasion requires, and this responsibility, command and supervision is constant throughout the entire watch. These were the duties Bjerre, the pilot, was discharging on the tug on the night in question, when, as the appellate court found, he was, in the absence of Johnson, the master, from the pilot house, directing the movement of the tug, just before the shackle carried away (Rec. 761) and not afterwards as petitioner would have the court conclude (Pet. Br. 73).

The eyes of a lookout in that pilot house would be about eighteen or nineteen feet above water line according to testimony of Bjerre (Rec. 261, 262) and forty feet aft of the stem (Johnson, Rec. 204).

Thirty feet above the water line and forty feet aft of the stem, was held an improper place for a lookout in *The Michigan*, 63 Fed. 280, 287, 288, C. C. A., 4th Cir., in a case of collision off Cape Henry, Va., in the Atlantic Ocean.

Crowded condition of deck of tug: The officers of the tug describe the condition of the deck of the tug as being too crowded with gear to station a lookout there (Bjerre, Rec. 277; Johnson, Rec. 323, 324; Dawe, Rec. 391, 392; Pet. Br. 55, 56).

"Overcrowding of the deck is no excuse for locating the lookout in a place less adapted for his purpose."

Brigham vs. Luckenbach, 140 Fed. 322, 325;

The Vedamore, 137 Fed. 844, 847, C. C. A., 4th Cir.;

The Manchioneal, 243 Fed. 801, 805, C. C. A., 2nd Cir.

(3) *Smoke Screen:* The night was dark, snow squalls and sleet (Dawe, Rec. 384); dirty night (Id. Rec. 398); Bjerre, the pilot, testified: That

"one reason for slowing down [at 1:00 a. m.] at that time we were burning Nanaimo coal, which makes an awful lot of smoke, and the wind at that time was a little bit starboard and was blowing the smoke over the port bow in the direction that we wanted to see Mary Island Light and the land, and it obscured our vision to a great extent and by easing the vessel up the smoke nuisance would be done away with to a great extent" (Rec. 233), "we done away with that smoke nuisance pretty much by slowing down" (Rec. 267).

"Proper lookouts are competent persons other than the master and helmsman, properly stationed for that purpose, on the forward part of the vessel, and the pilot house in the night time, especially if it is very dark and the view obstructed, is not a proper place."

The Ottawa, 3 Wall. 269; 273;

The George M. Dallas, 10 Fed. Cas. No. 5338.

"Pilot house, in the night, especially if dark and view obstructed with clouds in the

distance, not the proper place, whether windows were up or down."

St. John vs. Paine, 10 How. 557, 585.

(4) *Interruption of Vigilance of Lookout:* While the master of the tug on watch and in command of the navigation of the vessel was, as a matter of law, disqualified as a lookout, Bjerre, the pilot, in discharging the duty of lookout (in addition to acting as pilot) was subject to constant interruptions, such as conversations (Rec. 291, 318, 319, 350, 360, 390); being consulted from time to time by the master (Rec. 287); by having to direct the movements of the tug as one of the navigating officers (Rec. 317); by having to give orders to mate, orders and courses to helmsman (Rec. 71, 88, 89, 292, 360, 379); by having to lay out courses of the vessel, on a little shelf in the pilot house (Rec. 71, 326, 341); which necessitated keeping the light on in the pilot house in laying out courses on the chart, the effect of which was, as the master testified: "The longer you keep the light on the worse your eye-sight gets" (Rec. 489).

Croft testified that Johnson had not given him any orders during his (Croft's) watch that night up to the time of the accident—that he got his orders from Bjerre (Rec. 88); and Bjerre testified that as

a rule Johnson gave the orders to helmsman, at other times when the master was not in the pilot house, Dawe gave the orders, and when Dawe wasn't there, he, Bjerre, might have done it, passed the word as it were; never changed the wheel without referring to Johnson (Rec. 292).

That was "as a rule;" but Bjerre doesn't testify whether or not that "rule" was observed the night in question.

> "Lookouts must not be liable to be distracted by conversations."
>
> *The Tillicum,* 230 Fed. 415, U. S. C. C. A., 9th Cir.;
>
> *Brigham vs. Luckenbach,* 140 Fed. 326.

But assuming for the sake of argument that the proper place for the lookout was in the pilot house, the record shows that there was no one in the pilot house whose sole duty it was to discharge the duty of lookout, or whose other duties did not so conflict with the duty of lookout as to seriously impair, if not wholly destroy, his efficiency as a lookout.

The trial court found the tug had not on the bow or in the pilot house anyone whose sole duty it was to act as lookout (Rec. 732).

The rule as to the lookout, as laid down in the case of *The Ariadne,* 13 Wall. 475, 478, where Mr.

Justice Swayne, speaking for the court, said:

> "The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. A moment's negligence on his part may involve the loss of his vessel, with all the property and lives of all on board * * *. In the performance of this duty the law requires indefatigable care and sleepless vigilance * * *. Every doubt as to the performance of the duty and the effect of non-performance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary. *The Louisiana vs. Fisher*, 21 How. 1; *Chamberlain vs. Ward*, 21 How. 549; *Genessee Chief vs. Fitzhugh*, 12 How. 443,"

has been regarded by this court and recognized by inferior Federal courts as the law in cases of collision.

The Oregon, 158 U. S. 186, 193;

Rutland Trans. Co. vs. Smith Co., 209 Fed. 47, 48; U. S. C. C. A., 6th Cir.;

The Wilbur Smith, 217 Fed. 981, 984;

Eastern Dredging Co. vs. Winnisimmet Co., 162 Fed. 860, 862, U. S. C. C. A., 6th Cir.;

The George W. Roby, 111 Fed. 601, 612, U. S. C. C. A., 6th Cir.;

The Ancon, 6 Sawy. 118, 1 Fed. Cas. No. 348;

Robinson vs. Steam Nav. Co., 73 Fed. 883, 892, U. S. C. C. A., 6th Cir.;

Gr. Lakes S. S. Co. vs. Pittsburgh S. S. Co., 222 Fed. 862, 866, U. S. C. C. A., 6th Cir.;

Argo S. S. Co. vs. Buffalo S. S. Co., 223 Fed. 581, 588, U. S. C. C. A., 6th Cir.;

Flint etc. R. Co. vs. Mar. Ins. Co., 71 Fed. 210, 220;

The Minnie, 100 Fed. 128, 131, U. S. C. C. A., 4th Cir.;

The Echo, 131 Fed. 622, 631;

The Sitka, 132 Fed. 861, 864;

The Cypromene, 135 Fed. 558, 565;

Wilder's S. S. Co. vs. Low, 112 Fed. 161, 172, U. S. C. C. A., 9th Cir.

"A crew is not competent without a lookout, either on tugs or steamers. If there be none, the tug cannot avoid her responsibility by the oaths of the captain and crew if there be the slightest doubt as to the spring head of the catastrophe."

Circuit Justice Swayne in

The John Fretter, 13 Fed. Cas. No. 7342.

To the same effect

The Armstrong, 1 Brown, Adm. 130.

The evidence shows conclusively that the tug was without a lookout.

THIRD POINT.

The Want of Such Lookout Was a Contributing Cause of the Disaster.

(1) *The Burden of Proof:* The absence of a proper lookout properly stationed, in case of col-

lision, is *prima facie* evidence of negligence, and casts upon the guilty party the burden of proof of showing that the presence of the lookout could not have avoided the collision.

The Ariadne, 13 Wall. 475, 479;
The Genessee Chief, 12 How. 443, 463;
The John Fretter, 13 Fed. Cas. No. 7342;
The Armstrong, 1 Brown's Adm. 130.

(2) *The Evidence:*

(a) *Was the tug's helm put hard-a-port before the shackle broke?*

Croft's Statement: Croft, helmesman of the tug and at the helm at the time of the disaster, witness for respondent, testified:

> That he knew the towing device parted, knew it carried away; felt the jar; just before this, Captain Bjerre looked through the window and said 'pull her over' and jumped up and grabbed the wheel away from Croft; Croft was on the port side and couldn't pull the wheel over quick enough and Bjerre grabbed the wheel out of his hands and put it hard-down and then Croft got up near the wheel (Rec. 73); that the mate, Dawe, was there, the mate had just come in, just about when the shackle carried away (Rec. 73, 80) and Captain Johnson was not there (Rec. 73, 80); that the wheel remained hard-down, not very long; that Croft took the wheel from Captain Bjerre and in a few minutes Bjerre said 'Ease her up, ease her back again;' 'steady, steady' (Rec. 74); that

just when Bjerre called to put the wheel over, Croft looked through the window and saw some mist on the water that looked to him like wash on the rocks (Rec. 74); didn't know if it was breakers, it was white foam on the rocks, anyway (Rec. 92); that when he felt the jar he said to Bjerre, 'What is going on, has something happened,' and Bjerre said 'Yes, we lost the tow' (Rec. 74); that Johnson came in and Bjerre repeated and said 'Damn it, we lost that damned tow' (Rec. 75).

This testimony of Croft was in greater part contradicted by Johnson and Bjerre; Bjerre, admitting that he took the wheel away from Croft and put it hard-over, testified that this happened after the shackle had broken and at a time when the tug was bearing down on the drifting barge in an effort to put a line aboard of her; they fail to deny the words that passed between Croft and Bjerre, and from Bjerre to Johnson, as quoted above.

Croft, on rebuttal, was positive that Bjerre did not take the wheel away from him and put it hard-over *after* the shackle broke and the tug had made part of a circle and come back near the drifting barge (Rec. 501).

In determining whose statement the court should adopt, Croft's or Bjerre's, as to whether the tug's helm was put hard-over before or after the shackle broke, the court will consider not only to

what extent either witness is corroborated on the main point and to what extent generally corroborated, but will consider the interest of the witness in the issue, and also to what extent, if any, any witness is impeached and the credibility of his testimony so shaken as to render it unreliable, if not untrustworthy.

(b) *Croft's Credibility:* In considering the sharp conflict of testimony on this point, between Croft, for respondent, and Bjerre and Johnson, for petitioner, the attention of the court is called to the fact that the trial court, who saw and heard Croft on the witness stand, in passing on the testimony of Croft said in its memorandum opinion, on the merits:

> "While *Croft impressed me as being an honest man and while I have no doubt that he was testifying according to his best recollections*, yet I do not think that the libellant has established the point contended for [tug's wheel put hard-a-port before shackle broke] by a preponderance of the testimony" (Rec. 725). (Italics ours.)

Croft Corroborated by Foster: Croft's version of the matter, of the position of the tug when the little island was sighted, is supported by the testimony of Captain Foster, (himself a veteran navigator, trial court's memo. opinion, Rec. 729) super-

o on the barge, witness for respondent. The
e was following the tug 1080 feet astern (Rec.
401; Pet. Br. 28).

Foster testified:

"When the shackle broke the barge was put to port—in the trough of the sea—lost her headway—and going up in the trough of the sea—lost her headway and going sideways with the wind—the minute she come up in the trough of the sea, she stopped; she is helpless (Rec. 59); that he wheel of the barge was put hard-over and there was a jar (Rec. 27); felt the jar right at the time she changed her course; all happened right together; change of course and shackle broke immediately at the same time (Rec. 54); went on deck a minute and a half or two minutes after feeling the jar (Rec. 56); took a look ahead and surf caught his attention * * * on the little island (Rec. 28); when he first saw the little island the barge was 500 or 600 feet from it (Rec. 49); the tug was on the starboard, right ahead on the starboard side" (Rec. 56).

The officers of the tug testified: After the
kle broke the barge would drift and lose her
sha
hea
way (Bjerre, Rec. 237); that then the tug
tur
d around and looked for the barge (Id. Rec.
237
; the diameter of the circle in that turn was
two
hundred yards (Id. Rec. 273, 274); after the
tug
nade that turn the barge was then right close to
the
sland (Johnson, Rec. 321).

Master of Tug as Corroborative of Croft: Johnson testified:

> "At 1:45 the barge broke away (Rec. 329). Just a few minutes before, we seen a little island ahead of us and we ported our helm two points to clear the island (Rec. 312); the little island was half a mile away (Rec. 317); there was no turmoil or excitement at the time the two point change was made, by any body in the pilot house (Rec. 321); after the shackle broke, went back to see if we couldn't get the hawser back on the barge again (Rec. 321); went right up on her very handy (Rec. 322); then, we had to port the helm hard-a-port full speed ahead to get her out of there, Bjerre grabbed hold of the wheel and pulled her out of there, saying to the quartermaster, Croft, 'You are too darned slow'" (Rec. 322).

So far Johnson seems to corroborate Bjerre.

There was sufficient depth of water right up to the little island (Chart, respondent's exhibit V); and it would have taken the tug, going at the rate of five knots an hour, the speed which petitioner's witnesses say she was making then (Bjerre, Rec. 235; Johnson, Rec. 320), six minutes to reach the island if she steamed right towards it; and yet, with Bjerre calling Johnson's attention to the little island half a mile ahead: "Frank, there is a small island ahead of us" and Johnson leisurely suggesting "Yes, I see it—don't you think we had better haul out?" and directing the helmsman to port two points (Rec.

235); with no turmoil or excitement in the pilot house, with the barge following astern and nothing to prevent this *two point change* of course being noted on the log book, as the next preceding change of course of *one-half a point,* at 1:00 o'clock (Johnson, Rec. 328), had been noted, Johnson, on direct-examination by petitioner, testified as follows:

> Q. Is there any notation in this log book of the two point change that was made a few minutes before the shackle broke?
>
> A. No, that isn't in there.
>
> Q. Explain to the court how that happened.
>
> A. We were getting *too close* to the island at that time, and I thought I would let it go until we got to Mary Island Light, and I would put them down both together * * *
>
> Q. I am speaking of the two point change you made when you sighted the small island—does that change appear in the book?
>
> A. No.
>
> Q. Why?
>
> A. Because we were *too close* to the island —and it was dirty, and everything (Rec. 329).

That position of the tug, twice repeated, of being "too close" to the little island, as a reason given by Johnson for not noting the change of course in the log book, which notation would naturally be made after the change had been accomplished and while the tug was swinging clear of the island,

mate
the tches up with Croft's statement that, at that time, tug was dangerously near the island.

islan If the tug had been half a mile distant from the for nd as Johnson testifies, it would have been safe chan the tug and tow, and not "too close" to log the islan ge of course. Half a mile away from the little Half d, that was safe (Capt. Brinker, Rec. 633); 592) f a mile far enough off (Capt. Jacobson, Rec. Rec. ; Half a mile is a good safe clearance (Dawe, roun 413, 414); Dawe had made not less than thirty all c d trips through that channel (Rec. 389, 390); the f of whom were witnesses for petitioner. With been tug's helm held to port, the turn would have ship, continuing until the helm was again put mid- half , allowing the tug and tow to clear the island a mile.

The Jar Caused by the Breaking of the Shackle: Crof t testified that he felt the jar (Rec. 73); and rema arked about it to Bjerre (Rec. 74); Foster, on the barge, felt the jar (Rec. 27, 54); while neither Bjer re (Rec 249) nor Dawe (Rec. 379, 381, 388) woul d admit feeling any jar; and Smith, engineer on th he tug, (Rec. 375) and Johnson, master, (Rec. 361) indirectly denied having felt any jar.

Croft's Testimony Corroborated by Condition of Shackle: What remained of the shackle (Ex. D1

to D7) was submitted to the testing engineer, Avis, witness for respondent, who reported (Ex. E), among other things, that the material of the shackle was uniform in texture and a fair sample of forging; and that judging from the appearance of the old fracture it was evident that the specimen had been broken by a stress very suddenly applied and which undoubtedly would have broken a shackle made from a much larger bar (Rec. 108).

Later a specimen was subjected by the engineer to a test to determine its ductility or non-ductility, its elastic limit, its tensile strength and the presence or absence of crystallization. His testimony as to the result of that test is reviewed in this brief in the Fourth Point, under the heading "Crystallization of the Shackle." The tensile strength of the specimen tested was 43.4 tons with an elongation of 50 per cent and no crystallization whatever present, evidenced by its ductility and its fibrous fracture (Rec. 109-123, 502, 503).

(c) *Bjerre's Credibility:*

Dawe, the Mate, Contradicts Bjerre: Bjerre testified that he asked the mate the distance they were off Tree Point Light (at 11:19 p. m.) and that the mate said between half and three-quarters of a

mile, or possibly a mile (Rec. 232). But Dawe, according to his own testimony when called by petitioner, did not know the condition of the weather at Tree Point (Rec. 384), he did not come on watch and go up into the wheelhouse until 12 o'clock midnight (Rec. 379).

Croft's Testimony as to Officer in Command of Tug, Denied by Bjerre and Johnson, Corroborated by Dawe: Bjerre and Johnson both testified that when Bjerre gave any orders it was only on the suggestion from Johnson or after the advisability of the order had been referred to and assented to by Johnson, the master (Bjerre, Rec. 236, 292; Johnson, Rec. 360); Croft testified that he got his orders from Bjerre—Johnson never gave an order that night during his watch until the shackle broke (Rec. 87, 88); mate didn't give him any orders while Bjerre was there (Rec. 89).

Dawe, the mate of the tug, had deposed in the case in the month of July prior to the trial, and when asked at that time who was in command of the tug upon his coming on watch at 12 o'clock, answered: "Captain Bjerre was in charge I believe" (Rec. 394); on redirect examination, at the trial, he attempted to explain by stating that he knew Captain Bjerre was there in the interest of

the owners and if he gave him, Dawe, any orders he naturally would have to take them" (Rec. 410).

This was assuming some command on the part of one who had signed on the tug's shipping articles as purser and who was acting pilot (Bjerre, Rec. 231); *and who didn't have any watch the night of the disaster* (Id. Rec. 260).

Impeachment of Bjerre: The character of the master, as a seaman and navigator of reasonable care, caution and maritime skill was one of the issues raised by the pleadings and tried. Bjerre had testified for petitioner, that his opinion (at the time of the trial) of Johnson, master of the tug, as to his care, skill, and prudence as a navigator was very high (Rec. 258); and on cross-examination that Johnson was a man who could be trusted with floating property of value of $150,000.00 aboard, far away from his home port (Rec. 282). Yet this witness was compelled to admit on cross-examination, that on a subsequent voyage of the tug, towing the same barge, when Johnson was master and Bjerre pilot, (Rec. 286) Johnson had absented himself from his vessel at Ketchikan, unnecessarily several hours,

had come back in an intoxicated condition, mentally and physically unfitted to stand a watch, losing a tide (Rec. 282-286); witness felt that Johnson had abused the confidence the owners had reposed in him (Rec. 285). The object of this cross-examination, as declared by counsel for respondent at the time (Rec. 363), was not to drag into the trial the conduct of the master on a subsequent voyage but for the purpose of impeaching Bjerre, witness for petitioner, out of his own mouth; and for the purpose of showing Bjerre's statement on a vital issue in the case was not only untrue but was an untruth deliberately made and could have been made for no other purpose than to deceive the court. This is a harsh statement to make but the truth is its justification. If it should be contended that Bjerre was trying to screen a friend and ship-mate, the screen was being used at respondent's expense; and if Bjerre would screen his friend Johnson, Bjerre would screen his owners, the petitioner. We invoke the rule: *"Falsus in uno falsus in omnibus." The Santissima Trinidad,* 7 Wheat. 283, 339.

(d) *Johnson's Credibility:* Johnson corrob-

orated Bjerre in some matters, one—with respect to the time when Bjerre said that the tug ported her helm; in other matters he flatly contradicted Bjerre, as in the Ketchikan incident above (Rec. 364); Johnson even contradicted himself, testifying "both ways" as to entries in the log, as he admitted (Rec. 339, 340, 340). The content of his testimony is its own refutation as credible evidence and a refutation as to his competency (Rec. 338, 347-348, 357,358), as witness his statement that he had a better memory at the trial in November than he had in the preceding month of June, regarding the transactions in the preceding month of March (Rec. 488-489) when at the trial it was necessary for him to explain the contradictions between his deposition taken in June and his testimony at the trial; his ignorance of a simple compass problem (Rec. 332-339) when after a futile effort of half an hour, by the clock (Rec. 339), while on the witness stand, he failed to solve the problem, and the patience of the court being exhausted it instructed counsel for respondent to ask another question (Rec. 339) to go on with his examination.

Should it be contended, in weighing the credibility of Croft and Bjerre, that Croft's testimony as to the stand-by bells to the engine-room was con-

tradicted by master, mate and engineer of the tug, all corroborating Bjerre, we would answer that such contention was not very persuasive; the giving of signals to the engine-room from the pilot house and the response from the engine-room might make no more impression upon the helmsman, intent for six hours' watch upon his compass and the constant manipulation of the tug's heavy wheel (6-ft. wheel, Bjerre, Rec. 237, 238), unless his attention was specially called to those signals, than the striking of the passing hours of a library clock upon one intent on reading or in earnest conversation. It is the daily experience among men that they can be within the sound of a striking clock for hours and have no recollection of having heard it strike. But the sight of the breakers and the fact of having the tug's wheel grabbed from him, followed by a jar, and that jar followed by the statement of the pilot to him, that the tow had broken away, would very likely make a vivid and lasting impression upon a man, even of the lowest sensibility or a man the most unimpressionable.

Foster, supercargo on the barge, testified that immediately after he came on deck of the barge, when the shackle broke, he first heard the breakers on the island and could just recognize them immedi-

ately afterwards—the barge, 500 or 600 feet from the island, was still going in (Rec. 49, 62); drifting inshore, though she had lost her headway (Rec. 59).

If the sound of the breakers on the island could be heard at that distance and the island sighted immediately afterwards by those on the drifting barge, then the failure of those on watch in the pilot house of the tug to pick up the land before they were almost in the breakers, must have been due to impaired vision, to want of vigilance, or to the fact that the pilot house of the tug was not the proper station of the lookout.

The appellate court said that it could not be properly held that * * * a lookout properly stationed would not have seen and reported the island ahead in ample time to have afforded the tug an opportunity to make a safe turn with the tow following (Rec. 761).

We submit on this third point, not only did the petitioner fail to sustain the burden of proof, but that the preponderance of the evidence sustains the contention of respondent, that the tug's wheel was put hard over before the shackle broke, thereby producing the strain on the tow line which caused the shackle to break; and that the necessity of the

sudden change of the tug's course at that time was, that, for want of a proper lookout properly stationed, the tug had not been able to pick up the little island far enough away to give time for a manoeuvre which would have resulted in both tug and barge passing clear. The want of a lookout was a contributing cause of the disaster.

FOURTH POINT.

The Shackle Was Seaworthy; the Breaking of the Shackle Was Due to Sudden and Excessive Strain Caused by Sudden Change of Tug's Course Without Warning.

(1) *The Constituent Parts of the Towing Device:* The towing device consisted of the tug's hawser connected on to the barge's shackle, which in turn was connected on to the anchor chain of the barge, and the anchor chain was made fast to the barge's windlass (Rec. 19); the tow line was one and one-quarter inch flexible steel (Rec. 113, 114) with a tensile strength of 54 tons (Rec. 114); the shackle was one and one-half inch wrought iron (Rec. 37, 117) with a tensile strength of 43.4 tons (Rec. 111); and the anchor chain was one and one-half inch reinforced iron (Rec. 120) with a tensile strength of 47 tons (Rec. 114); the shackle was the

weakest element of the three. The shackle, purchased by respondent personally (Rec. 15), was new (Rec. 182).

(2) *Crystallization of the Shackle:* The parts of the shackle, remaining after the disaster, were given to a testing engineer in whose laboratory, the most complete on the Pacific Coast, a section of it was subjected to a test to determine its ductility or non-ductility, its elastic limit, its tensile strength or breaking load, and whether or not there was any evidence of crystallization present. The parts of the shackle are in evidence as Exhibits D-1 to D-7. (Rec. 128.)

This test was made by an expert in that science, whose education, training and experience, covering a period of many years, had qualified him as thoroughly competent to make the test.

According to his testimony the tensile strength test of this shackle was taken right through the center of the weld; and the result of that test was as follows: The slag spot in the specimens was .08 square inch of the total area (Rec 108), which had the effect of reducing the strength of the shackle about five per cent—it would take five per cent less of a load to break the shackle than to break an

absoluutely perfect shackle (Rec. 199, 200); that the tensile strength was 52,300 pounds per square inch, with the shackle having an area of 1.66 square inch, which gave the actual strength of the shackle as 86,400 pounds, or 43.4 tons, the actual breaking load sufficient to break the shackle (Rec. 111); that the elastic limit was 34,250 pounds per square inch (Rec. 111), or with the shackle having an area of 1.66 square inch, of 56,885 pounds, or 28.477 tons; that the test developed an elongation of fifty per cent (Rec. 111, 112); that he found no crystallization whatever in the tested section, the absence of which was evidenced by ductility and its fibrous fracture, which is not characteristic of crystallization (Rec. 112); that the factor of safety of the shackle would be one-third of 43.4 tons, about 14.46 tons (Rec. 115); that the shackle was good merchantable wrought iron (Rec. 116); that if the metal had been crystallized before fracture at Mary Island, by improper heat treatment, it would be uniform throughout its structure (Rec. 121); that the fractured ends showed crystallized fracture, due to violent rupture produced by sudden impact and confined to the small surface immediately at the point of fracture (Rec. 112); that the crystallization shown in the specimens was caused by violent and sudden impact, causing a violent rupture; if the

elec
wor ment of sudden impact were not present there
sud uld be no crystallization (Rec. 121); that the
tim dden impact could not have taken place at a prior
occ ne than when the shackle broke because if it had
sha curred at a prior time it would have broken the
thr ackle; that wrought iron becomes crystallized
the rough improper heat treatment, that and possibly
trea presence of a high per cent of sulphur; heat
not atment in the forging process (Rec. 122); would
only t crystallize by constant jarring (Rec. 122, 123);
heat ly by an extreme violent jar or application of
was at (Rec. 123); that the material of the shackle
fair s uniform in texture and could be considered a
of t ir sample of forging (Rec. 108); that the length
dian the weld would be approximately three times the
the ameter of the bar (3 x 1½ inch) (Rec. 502); that
not e length of the scarf on the shackle in welding was
the t in evidence (Rec. 503); that the slag indicated
503) e presence of a weld, the center of the weld (Rec.
area 3); that if the weld had been an improper one,
e breach, instead of being at right angles to the
the p ca of the bar, would be along the scarf (Rec. 503).
in fa Petitioner's experts were unable to testify that
of th pieces of the shackle introduced in evidence were
fact crystallized but theorized on crystallization
the shackle by vibration, to which the shackle

had been subjected while in use on over 10,000 miles of previous sea voyages of the barge, between Seattle and Anchorage; and while one of these experts, Tinkham, stated that all standard works lay down the rule in reference to good wrought iron that when subjected to shocks or repeated stresses *which exceed the elastic limit,* the molecular structure becomes more or less crystallized (Rec. 426), there is no evidence any where in the record that this particular shackle on the voyages covering 10,000 miles or over, or the voyage when the barge stranded, was subjected to any repeated stresses *exceeding its elastic limit,* which was found in the testing machine to be, actual load, 6,850 pounds, or on the square inch basis 34,250 pounds (Rec. 111), which would be, for this shackle of 1.66 square inches area, 56,885 pounds, or 28.477 tons, practically twice the factor of safety.

Counsel for petitioner, at the trial, admitted that he could not give the strength of the vibrations the shackle and tow line were subjected to on the previous voyages or on the voyage when the barge was stranded, "it was impossible for anybody to do that" (Rec. 432).

That crystallization of wrought iron by vibration was but a theory was borne out by the state-

ment to that effect from Kent's Mechanical Engineers' Hand Book, 1912, read into the record by petitioner at pages 507, 508 of the Record.

Respondent's expert on rebuttal denied the correctness of that theory; his denials being based on personal experience in extensive laboratory work of thousands of tests with millions of vibrations on wrought iron (Rec. 504-506).

(3) *The Towing Machine:* The tug was equipped with a towing machine, to which the forward end of the hawser, constituting the tow line, was made fast, and which was capable of an adjustment so that, under ordinary usage, when a strain came on the line, the line paid out and when the strain was over, the machine took up the slack. The master of the tug in describing the working of the machine said: That all the line wouldn't run out (off the drum) because the steam would stop it from all going out (Rec. 353, 354); she takes in just as much as she lets out (Rec. 356; 374).

It appears from the evidence that the towing machine is so constructed that it can be so adjusted, when working automatically, as to let a certain amount of the hawser run off the drum when a strain comes on the line; doesn't let it all run out; that when all has run out that the then present

adjustment will permit to run out, the steam stops it from further running out; that when the strain relaxes, the machine takes up the slack in the hawser to the extent that it let it out; that there is a constant quantity of strain in the pull of the tug in towing and in the resistance of water and air; then an intermittent superadded strain from what is called the "sea-way"; as the strain exerts its force the machine allows the hawser to pay out and as the maximum strain relaxes, it takes in the slack again to the added—that must necessarily be so, else the drum that can pay out under any given super- a continuing strain the hawser would reel off underthe drum its last fathom and then hold rigid be- the end would be made fast so that it could cause all reel off and into the sea, severing the con- not an nection of tug and tow.

Dawe, the mate of the tug, tells us how the

I line worked and the hawser ran out, on the night machi disaster, at the time the shackle broke: Some of the it required a little more or a little less steam; times times the tow pulled the wire hawser out pretty some nd you would want to take it up with steam far a 412); that he went down and stood by the (Rec. g machine; and after that—half an hour or towin

three-quarters of an hour, or somewhere along there —the vessel changed her course two or three points; and that shortly after that he felt the hawser, he had his hand on the hawser at the time he felt it carry away; and then the towing machine started to heave in (Rec. 379); that as soon as the shackle parted the machine started to heave in, right away; that is the way he knew the shackle had parted; that he felt the wire, the wire hawser slackened (Rec. 399); his hand was on the wire "aft part of the machine, just aft of the machine" (Rec. 400), close to the machine (Rec. 409); that at the time his hand was on the hawser; that the hawser paid out a very little—maybe a foot or eighteen inches, somewhere around there (Rec. 409), *but it wasn't running off the drum when it parted* (Rec. 400).

Croft testified that Dawe was in the pilot house when the shackle parted (Rec. 73, 80); but if the towing machine was in "automatic" and if Dawe was there and had his hand on the hawser, he alone knew that the line was rigid when it parted, as he testified. According to his story the strain had pulled off the reel all the hawser that the adjustment would then allow to run off, and, the strain then continuing, the wire hawser became rigid and then something gave way, which was the weakest element

in the tow line, which, as shown by the testimony, was the shackle.

Other witnesses for petitioner testified, variably, that a right angle turn of the tug, putting the wheel hard-over, would produce more or less of an extra strain; but also testified uniformly, generally, that such extra strain would be taken up by the towing machine (Cann, Rec. 570; Jacobson, Id. 583; E. W. Smith, Id. 610, 615; Brinker, Id. 625, 631; Olson, Id. 642, 646; Snoddy, Id. 652, 659; Neilsen, Id. 670, 671, 687).

If the hawser was not "paying out" when the shackle broke, as Dawe testified, then, at the moment of fracture, either the strain, if any, on the hawser caused by the turn, if any, had ceased; or the line was rigid and the machine was not taking care of the hawser under that strain. Under the first alternative, the shackle must have broken without any superadded strain whatever, and not from a stress very suddenly applied, as Avis, for respondent, testified the condition of the shackle showed (Rec. 108); under the second alternative, the compensating tendency of the towing machine to relieve the strain was not sufficient to reduce that strain below the breaking load of the shackle. Avis testified that there was no evidence of the sufficiency of

such compensating tendency to so reduce the strain, which at a right angle turn of the tug was 114 tons (Rec. 117-120), below the breaking load of the shackle, to-wit, 43.4 tons (Rec. 134, 139); and further testified that had the towing machine been compensating and the load of 114 tons *gradually* been brought on the hawser with sufficient strength to break the shackle, the shackle would have been broken in identically the same way as the test specimen broke under that test, showing elongation and reduction of area, and fibrous fracture, and that the shackle showed neither elongation nor fibrous fracture (Rec. 140, 141).

An effort was made by petitioner to show by Avis that the shackle, although its tensile strength or breaking load was 43.4 tons, should have withstood a stress of 86.8 tons (Rec. 189), with the stress applied to both sides of the shackle simultaneously; however that may be as a matter of physics, the witness was unable to state, of course, that both sides did in fact break simultaneously (Rec. 198). The breaking load of the shackle being established by the test at 43.4 tons, whatever stress might have been developed by the manoeuvre of the tug, under the formula: "mass times velocity times the time" (Rec. 119), under the law, that to every action there

is an equal and opposite reaction, that stress never developed beyond the tensile strength of the shackle.

Of course, if Dawe, at the time the shackle broke, was in the pilot house and not at the towing machine—if Croft's testimony is to be believed and not that of Bjerre, Johnson and Dawe, on the question as to when the shackle broke—then all the testimony of petitioner regarding the operation and compensating tendency of the towing machine falls to the ground, has no bearing whatever on the facts of the case.

The parting of the shackle then was either due to its unseaworthiness or to the excessive strain to which it was subjected by the sudden turn of the tug in its course, without warning.

(4) *The Barge Was Following the Tug:* That the barge was properly following the tug is evident: The helmsman on watch on the barge at the time of the accident was a certified seaman (Foster, supercargo of barge, Rec. 26); his orders were to follow the tug (Id. Rec. 65); when witness was on deck of the barge that night the barge was properly following (Id. Rec. 26); and referring to the time when the tow line parted, the witness said: The barge was put aport and then there was a jar (Id. Rec. 27); the man at the wheel is supposed to get his informa-

tion by looking at the light on the tug to see which way the tug is going to change and he does accordingly (Id. Rec. 65). Between 11:19 and 1:00 o'clock, looked back a few times to see the barge (Johnson, Rec. 350); the barge followed the wake of the tug very good in those turns (previous changes of courses on same voyage) (Bjerre, Rec. 305). Whenever I looked back I saw the tug (Bjerre, Rec. 307). She was following in our wake (Bjerre, Rec. 255).

Petition raised no question whatever as to the barge properly following the tug on the night of the stranding or at any time during the voyage.

(5) *No Warning by Tug to Tow of Sudden Change of Course:* Though Bjerre testified that a short blast of the tug's whistle would mean that it was going to put its helm over to port—that was universal, known to all shipping men the world over (Rec. 306)—no warning was given the barge by the tug that the latter was about to make a *sudden* turn (Foster, Rec. 26, 57; Bjerre, Rec. 250, 252; Dawe, Rec. 380, 381; Finding of Trial Court, Rec. 725) (Croft, Rec. 70).

The barge evidently saw the tug's lights and its change of course and attempted to conform thereto but for want of timely warning it was too late to

prevent the excessive strain on the tow line.

(6) *Speed of the Tug:* The tug, at the time the shackle broke, was making somewhere between 7.397 knots and 6.65 knots an hour. See Table Three, in Fifth Point of this brief, taking "as termini," three-fourths mile off Tree Point and the southeastern point of the little island.

The shackle was seaworthy and its breaking was due to the *sudden* and excessive strain resulting from the *abrupt* change of course of tug without warning. The tug is liable for damages caused thereby.

Wilson vs. Sibley, 36 Fed. 379.
The Luckenbach, 23 Fed. 725.
The S. S. Wilhelm, 59 Fed. 169.

As the appellate court found, the evidence showing that the shackle was new when bought by respondent, was of sufficient size, had been used successfully in several similar voyages to Alaska and had stood the strain of the towing here in question in squally weather up to the point when the unusual strain was put upon it by the sudden jerk of the tug caused by its abrupt turn without any warning or opportunity given the tow to meet such strain by a conforming change in its course, leaves no ground for any other conclusion than that the break

would not have occurred but for the negligent navigation of the tug (Rec. 763, 764).

FIFTH POINT.

There Was a Want of Reasonable Care, Caution and Maritime Skill on the Part of Those in Charge of the Tug.

(1) *When the tug sighted the little island, right ahead* (Rec. 234), *she was off her course 2.5 miles, after a run of about 18 miles from her last point of departure.*

The tide was flooding, set north a little, main trend, eastward (Foster, Rec. 24, 25) (Rec. 177).

(a) *Error in Making Courses:* The courses, compass and magnetic, as disclosed by the log book of the tug (Ex. 28) are as follows:

Table One.

First Course: From Tree Point; 11:19 p. m. to 1:00 a. m.:

Actual compass course (Rec. p. 294.)	NW½W	309° 23′	
Add deviation (easterly):		2°	
Magnetic course actually:		311° 23′	N48° 37′W
(Rec. p. 295.) (Rec. p. 495.)			N48½W
Bjerre calculated his compass course of NW½W would make his actual course (magnetic):	NW⅜W	310° 47′	N49¼W
(Rec. pp. 273, 297, 495.) Divergence		36′	easterly

Second Course: Thence 1:00 a. m. to 1:45 a. m.:

Actual compass course: (Rec. p. 233-234.)	NW	315°	
Add deviation (easterly):		2°	
Magnetic course actually: (Rec. p. 495.)		317°	N43W
Bjerre calculated his compass course of NW would make his actual course (magnetic): (Rec. pp. 303, 495.)	NW⅛W	313° 36′	N46½W
Divergence:		3° 24′	easterly

Bjerre, in making allowance for the deviation:
On the 1st course DEDUCTED ⅛ of a point from his compass course; NW½W minus ⅛=NW⅜W.
On the 2nd course, he ADDED ⅛ of a point to his compass course; NW plus ⅛=NW⅛W.

Note—The deviation of 2° has been added to the compass course in the above illustrations because in going around the compass to the right a deviation easterly is added; in going around the compass to the left the deviation is deducted (Bjerre, Rec. p. 295; Rec. p. 467); the result, of course, is the same:

		To Left	To Right
Compass course, NW:		N 45° W	315°
Deviation of 2°:	Deduct	2°	
	Add		2°
Actual magnetic course:		N 43° W	317°

Respondent's exhibit V shows these courses plotted on the chart of those waters, by Captain Debrell, Lighthouse Inspector for the District of Alaska, witness for respondent.

At the end of the two sets of courses as plotted on Exhibit V, 17½ miles from the common point of departure ¾ miles off Tree Point, they are .45 miles apart (Rec. 494, 495); and a vessel there on those courses would be abeam of the little island, near Mary Island, on which the barge was stranded, which was 18.5 miles from Tree Point in a straight line; and on the westerly of the courses as plotted,

the magnetic course, the vessel would be 2.50 miles off and abeam of the little island. The tug, if she pursued the compass courses her officers testified she steered, would have been 2.95 miles abreast of and distant from the little island.

(b) *Error in Calculating Speed of the Tug:* The tide was flooding (Rec. 24).

Table Two

From Tree Point, the courses, speed, time and distances run, as testified to by Bjerre and Johnson, were as follows:

Time.	Tug's Courses:	
11:19 pm	Tree Point NW½W ship's compass (NW⅜W magnetic)	Bjerre, Rec. 233, 303
	Log book entry	Johnson, Rec. 328
	Entry made at 11:19	Johnson, Rec. 328
	Between 11:19 pm and 1:00 am	
	Speed:	
	Between 7 and 8 knots,	Johnson, Rec. 312, 313
	Between 7½ and 8 knots,	Bjerre, Rec. 233
	About 7½ knots,	Bjerre, Rec. 259
	Distance run:	
	12½ miles,	Johnson, Rec. 320
	12 miles,	Bjerre, Rec. 291
1:00 am	Changed, slowed down, NW ship's compass (NW⅛W magnetic)	Bjerre, Rec. 303
	Log book entry,	Johnson, Rec. 328
	Entry made at 1:00 am	Johnson, Rec. 329
	Between 1:00 and 1:45 am	
	Speed: 5 knots,	Bjerre, Rec. 235
	Saw by dial on telegraph in pilot house, tug going at half speed,	{Bjerre, Rec. 235
	5 knots,	{Johnson, Rec. 320
	Distance run: 3¾ miles,	Johnson, Rec. 320
	A few minutes before a quarter to two saw a small island ahead,	Johnson, Rec. 312
	Just fair ahead, about right ahead,	Bjerre, Rec. 234
	We ported our helm two points to clear the island,	Johnson, Rec. 312
	Distance run from Tree Point (11:19 pm) to two-point change of course at 1:00 am, 17, 16 or 17 miles,	Bjerre, Rec. 263
	17½ miles,	Johnson, Rec. 345

	12½ miles at 7½ knots and 3¾ miles at 5 knots wouldn't take them 17½ miles; there may have been some error in calculation of speed, enough to make up difference,	Johnson, Rec. 346
	About 18 miles from Tree Point to the little island,	Johnson, Rec. 345
	Went within ½ mile of island, 17½ miles,	Johnson, Rec. 345
	Didn't know how many minutes after two point turn before machine began running away (when shackle broke) (towing machine),	Johnson, Rec. 348
1:45 am	Barge broke away, Log book entry, This entry made "sometime in the morning when we anchored or was running around, I don't know which,"	Johnson, Rec. 329 Johnson, Rec. 329

Table Three.

Take as termini: a point ¾ of a mile off Tree Point and a point ½mile southeasterly of the little island:

Time actually consumed in run between termini: 11:19 pm to 1:45 am, 2 hours 26 minutes.

Distance between termini:
17 miles on straight line;
17½ miles on two courses, first of which was NW⅜W mag.

Rate of speed per hour tug travelled:

On straight line,	7.124 knots
On the two courses in log book if first course, 11:19 pm to 1:00 am was 7½ knots per hour, then on second course, 1:00 to 1:45 am speed was per hour,	6.62 knots
if first course was 8 knots per hour then on second course speed would be	5.98 knots

Take as termini: a point of ¾ miles off Tree Point and the southeast point of the little island:

Time actually consumed in run, as above, 2 hours 26 minutes.

Distance between termini:
18 miles in straight line.
18.5 miles on two courses, first of which was NW⅜W mag.

Rate of speed travelled:

On straight line,	7.397 knots
On two courses in log book,	
if on first course, 11:19 pm to 1:00 am speed was	7.5 knots
then on second course, 1:00 to 1:45 am speed was	7.3 knots
if on first course speed was	8 knots
then on second course speed would be	6.65 knots

Johnson was compelled to admit that running 12½ miles from Tree Point from 11:19 p. m. to 1:00 a. m., at 7½ knots, and then from 1:00 to 1:45 a. m., at 5 knots, the total distance run could be but 16¼

miles, a mile and a quarter short of a point one-half mile southeast of the little island near where they say they were when the shackle broke, which was 17½ miles from Tree Point.

But if instead of 17½ miles, the tug actually ran up to the little island, as Croft testified, a distance of 18 miles, then if from Tree Point at 11:19 p. m. to 1:00 a. m. they ran 7½ knots an hour, they had to run out the second course up to the island from 1:00 to 1:45 a. m. at the rate of 6.62 knots an hour, notwithstanding Bjerre said they were making on this second course (after 1:00 a. m.) 5 knots (which was half speed, Bjerre, Rec. 235; Johnson, Rec. 366), because he saw by the dial on the telegraph in the pilot house that the tug was making half speed (Bjerre, Rec. 235).

(2) *Causes of Tug Getting Off Her Course:* Bjerre, when asked to what he attributed getting off his course and finding himself head-on to that small island, answered:

(a) Possibility that we judged the light [Tree Point Light] to be half to three-quarters of a mile off and that threw us off the course; and, of course, in the course of further events, it is possible that we might have been further off than we figured;

(b) There may be a current that drove us over.

(c) The wind might have had a tendency to throw us over.

(d) Bad steering might have had a tendency to throw us over (Rec. 265).

Johnson, when asked the same question, answered:

(a) We might have been a little further off Tree Point than we figured on.

(b) It might have been the wind and the tide that threw us over.

(c) There might have been some other things that threw us over there (Rec. 326).

(d) There might have been some unknown currents or something (Rec. 327).

Departure from Tree Point: Was the tug further off Tree Point than they estimated?

Johnson testified: As they came by Lord Rocks, sighted them—got a very close departure—about an eighth of a mile—that was safe clearing that night—an eighth of a mile—not over that; course from Lord Rocks to Tree Point W. by N.; clearing Lord Rocks 1/8 mile on W. by N. course for Tree Point would

bring the tug abreast of Tree Point ¾ or ½ mile; that is the course pursued—clearing Lord Rocks ⅛ mile positive (Rec. 484). *Knows that he cleared Tree Point within ½ or ¾ of a mile* (Rec. 485).

This testimony eliminates any error in estimating the departure off Tree Point as a cause of the tug's getting off her course.

Currents: Bjerre, the pilot, testified he had had experience as master and pilot in runnning tugs and towing barges in southeastern Alaskan waters, including Revillagigedo Channel, of the size of the BANGOR and larger (Rec. 229); didn't take the currents into consideration because that is an unknown quantity (Rec. 272).

Johnson, the master, ...ified that he had had experience as quartermaster and master in those waters, making four or five trips a month for a year and a half (Rec. 311); currents in that channel, there isn't any—never encountered any (Rec. 326, 327).

Dawe, the mate, testified that he had made at least thirty trips through that channel as mate (Rec. 378).

Nielsen, for petitioner, with long experience in those waters (Rec. 668, 669), having made over

two hundred trips through that channel (Rec. 677), testified that he didn't know anything about the currents up in that channel (Rec. 670); very few times that current has not set him more or less out (Rec. 684); *that the currents would not be a contributing cause to put him (the* COMMODORE) *off his course;* the currents don't amount to much (Rec. 696); that upon a flood tide, if steering northwest, they expect to be favored by currents (Rec. 697).

> "The barge in making a north course don't have a tendency to make the tug have a westerly course" (Bjerre, Rec. 265).

If there were unknown currents, the more precaution the tug was bound to take, commensurate with the situation.

If there were no currents, they did not contribute to the tug's getting off her course.

The officers of the tug from their experience in those waters ought to have been fairly well acquainted with Revillagigedo Channel, sufficiently to know the dangers of navigation there and whether the tidal and other currents were an unknown or a known quantity, and to be able to govern themselves accordingly.

Where the dangers are an unknown quantity, the greater must be the precaution on the part of a

tug towing; they are the pilot for the barge, which is helpless and at the mercy of their knowledge or ignorance of local conditions as well as of their skill or lack of skill.

> "The care required of the tug with tow is only ordinary care; but ordinary degree of care of those engaged in towing is a high degree of care, for they hold themselves out as experts. The measure of care required is similar to that required of pilots. They are in fact pilots."
>
> *The C. W. Mills,* 241 Fed. 204, 205.

It will not do for them to say, after a disaster to the tow, that the unknown currents caused it, if they were previously aware there were currents, the effect of which was unknown.

The practice among seafaring men, particularly with tug and tow, in the exercise of prudence and care, to go to anchor at night, where it is dangerous to proceed in the dark, under unfavorable conditions of weather, is indicated in the testimony of Johnson where he said that on that particular voyage, just south of Tree Point, they hauled up towards Port Simpson so in case the weather got worse they could go in and anchor (Rec. 343). The weather did get worse, for it was only blowing 15 miles an hour at Port Simpson at 10:30 that night (Snoddy, Rec. 651); while later, after passing Tree

Point, the wind increased to 30 miles an hour.

In very thick fog, stop altogether and lay by until it clears off. You hear of it over and over again in these channels (Capt. H. R. Smith, for petitioner, Rec. 227).

The tug was bound to know the currents and if the currents were an unknown quantity, then the tug was bound to take extra precautions to safeguard the tow.

> "The tug is liable for grounding of tow thru improper handling of tug due to failure to appreciate the effects of the currents on tow."
>
> *Balti. etc. Barge Co. vs. Towage Co.*, 159 Fed. 755; Aff. 170 Fed. 442, 1 C. C. A.

The Wind: Was increasing from Tree Point (Bjerre, Rec. 289); glass was low (Bjerre, Rec. 266; Johnson, Rec. 327).

Bad Steering: There was no testimony on the part of the petitioner tending to show or attempting to show that the barge did not follow the tug properly; Johnson testified he looked back to see the tow a few times (Rec. 350).

If there was any bad steering, it was on the part of the tug.

If the tug had steered the log book courses, at

1:45 a. m. she would have been abreast of the little island, about 2.95 miles distant.

There might have been some other things that threw us over there. That was Johnson's testimony. It was *other things,* other than the causes to which he attributed the tug getting off her course, which, added to the tug's bad steering, was the cause of getting off her course; it was want of reasonable care and prudence and maritime skill, which in a run of 18 miles threw her off her course a distance of 2.95 miles.

(3) *Whistling for Echoes:* One precaution which the tug did not take was to whistle for echoes from shore.

Tug blew no whistles to get echoes, too far off shore (Bjerre, Rec. 259).

Cann, for petitioner, testified that, with time and distance run, it is proper to slow down and blow whistle and try to catch an echo (Rec. 577).

Olson, for petitioner, testified that good seamanship and skill and prudence would require blowing of whistles to get echoes, providing it was thick weather (Rec. 640). He always tried to, always blow whistles as they go along (Rec. 641).

Snoddy, for petitioner, testified: Keep sounding your horn and try to pick up an echo (Rec. 658); I would be blowing in case I did get echoes (Rec. 660). No harm in whistling—it might do good (Rec. 661).

Nielsen, for petitioner, testified: Use whistle for an echo, if you get close to shore; blow to find out if I get an echo (Rec. 683); would use it before I got close to shore, and find out; wise precaution having run 16¼ miles from Tree Point, to sound whistle and get echo (Rec. 685); whistle would have to be sounded if foggy or because of thick weather (Rec. 697).

(4) *Turning Back on Course:* Another precaution the tug could have taken, was to turn back on her course. She left Tree Point at 11:19 p. m. and Mary Island Light, 21 miles away, was the next point of departure. They had not picked up that light (Bjerre, Rec. 294), though they knew they had run 17½ miles by the speed and time consumed; they knew the Mary Island Light had a visibility of nine miles; and that on that night it should be visible two or three miles under the weather conditions prevailing (Bjerre, Rec. 271); that they should have seen Mary Island Light had they been within range of it (Bjerre, Rec. 293).

After the shackle broke, the tug turned and ran up against the wind getting round (Bjerre, Rec. 274) (that is, in turning around it ran southeasterly and away from the Light on Mary Island). Saw Mary Island Light, after we turned around first time, after shackle broke (Johnson, Rec. 328). They were then abreast of the little island (Bjerre, Rec. 255).

Being somewhere on the arc of a circle, the radius of which was 17½ miles, the center of which was Tree Point, and not picking up the Mary Island Light, they knew they were out of its range (Bjerre, Rec. 293, 294); that meant only one thing: that they were too far to the westward—in the other direction, easterly, they couldn't get out of the range of the light even if they went ashore (see chart, Ex. V.); counsel for petitioner admit that it was evident to master and pilot's minds that they were off their course and out of range of the light (Pet. Br. 125); being to the westward of the range of the light, in the proximity of Mary Island, it became very important for the safety of tug and tow to ascertain if possible how much too far they were to the westward—or if that could not be determined, to double the vigilance of the lookout, and to turn around on the course, head to wind and sea and wait until

daylight. They neglected that precaution.

E. W. Smith, for petitioner, testified: That running the course on a dirty night and not picking up the light (Mary Island Light) I would turn around, slow down and hold her head to the sea—that is the method we use for safety (Rec. 617).

Brinker, for petitioner, testified: I myself have run for Mary Island and had run distance out and did not find anything or hear anything and I turned around, if weather was such I could, and tried to hold on until daylight; coming about on opposite course, good seamanship (Rec. 632); duty to take every precaution, bound to take every precaution to save tow (Rec. 633). I wouldn't have turned around (Nielsen, Rec. 675).

(5) *Heaving Lead:* Brinker, for petitioner, testified that heaving the lead would be an extra precaution.

Cann, for petitioner, testified, that having run your time and distance so that he should be abreast of the light, the time is up, you have got to find something, it is better to haul right straight in and pick the island up * * *. We would use our lead, we would take every precaution possible (Rec. 577); I would use my lead (Rec. 579); will know

I am out there in deep water by soundings, 114, 117, 135 (fathoms) (Rec. 580).

By the weight of the evidence, those in charge of the tug showed negligence, want of reasonable care, caution and maritime skill:

Always in not having a lookout; and irrespective of burden of proof, in putting the tug's helm hard over;

In not signalling to the tow the change of helm of the tug;

In not whistling for echoes;

In not turning back on their course;

In not heaving a lead;

In miscalculating courses and speed;

In not taking into consideration the currents, which Bjerre said were an unknown quantity, to the extent at least of safeguarding the barge against an unknown quantity, lest it should be a dangerous one, if currents set them over.

> "A tug with a tow is bound to exercise such care as would be commensurate with the situation."
>
> *Gr. Lakes Towing Co. vs. Amer. Shipbldg. Co.*, 243 Fed. 849, 852.
>
> *The Margaret*, 94 U. S. 494.

Chamberlain vs. Ward, 21 How. 548.

The Marie Palmer, 191 Fed. 79.

Hughes, Admiralty, 123.

The C. W. Mills, 241 Fed. 204.

Channel, Bound to Know Conditions:

Winslow vs. Thompson, 134 Fed. 546, 1 C. C. A.

"The tug must know depth of water, obstructions, state of the tides, proper time for entering upon service and generally all conditions which are essential to safe performance of her undertaking."

Schuyler vs. Tillyer, 41 Fed. 477.

Master Must Know Effect of Tides:

The Florence, 88 Fed. 302.

Channel:

"If accident results from want of proper knowledge on tug's part, of the difficulties of navigation in waters which are the theater of his tug's operations, the owners of tugs are liable."

The Florence, 88 Fed. 302.

The want of a lookout on the tug imposed upon it the necessity of explaining how she came to be so far off her course in running such a short distance (two and a half miles off the course in a distance of eighteen miles) *The William H. Webb*, 14 Wall. 406, 414. This burden was not sustained by the tug.

Petitioner's Contention as to Findings of the Trial Court.

Counsel for petitioner contend, under the heading "Findings of the District Court and their effect," pp. 9-20 of their brief, for the application of the rule adopted in the Circuit Court of Appeals for the Ninth Circuit, that the findings of fact of the trial court will not be disturbed in the appellate court, in admiralty cases, unless it clearly appears there was error.

It might be well enough to address such an argument to the circuit court of appeals in an effort to induce that court to accept the findings of the trial court; but having done so in the case at bar and not prevailed, the argument not only loses its force in this court but it emphasizes the fact that the appellate court in reversing the trial court on the facts did in fact find error; and that, in the language of Circuit Judge Baker, quoted on page 10 of petitioner's brief:

> " * * * the cold type in the record demonstrates that a material finding either was unsupported by evidence or was made in the face of a clearly ascertainable preponderance to the contrary."

PETITIONER'S STATEMENTS OF THE TESTIMONY.

We are constrained to take exception to the accuracy of many of petitioner's statements of the testimony in its brief, and to question many of its conclusions. As for instance:

(1) Where petitioner's brief (pp. 64, 65) reads:

> "Capt. J. E. Brinker, witness for petitioner, * * * was not asked anything on direct-examination as to the lookout or his station, but, on cross-examination by respondent, and after witness had been given the conditions of the weather and the circumstances (Record, p. 630) (*sic*), he said that the wheelhouse is the proper and best place for the lookout under the conditions existing the night of the accident."

There is no such testimony in the record: the witness was not asked by anyone as to the lookout or his station and did not volunteer any such testimony.

(2) Where petitioner's brief (pp. 59, 61) reads:

> "Capt. Dawe, mate, testified * * * Capt. Johnson told me to stand by the towing machine (Record, p. 395)."

There is no such testimony on page 395 or on any other page of the record.

(3) Where petitioner's brief (pp. 73, 74) reads:

> "The only time Bjerre directed the movements of the vessel was after the barge broke away."
>
> "Croft says (Record, p. 71) that Capt. Bjerre gave most of the orders to him, but evidently he refers to the time after the shackle broke."

Croft testified:

> Q. Did Captain Johnson give you any orders during your watch up until the time the shackle broke?
>
> A. No, sir.
>
> Q. He never gave you an order?
>
> A. No, sir; not that night, anyway.
>
> Q. I am speaking now of between the hour of 12 o'clock and the time the shackle broke.
>
> A. Yes, sir.
>
> Q. He didn't give you any orders?
>
> A. No, sir; I got my orders from Captain Bjerre (Cross-Ex., Rec. p. 88).

The matter is material, because there is considerable question as to who was, in fact, in charge of the tug that night, Johnson, its master, or Bjerre, its pilot and the port or "shore captain" of petitioner, and superior to Johnson.

(4) Where petitioner's brief (p. 84) reads:

"Capt. Bjerre says that when the vessel slowed down at one o'clock whatever smoke nuisance there was was practically done away with."

What *Bjerre* actually said was:

"We done away with that smoke nuisance pretty much by slowing down" (Rec. p. 267).

"Doing away * * * pretty much" with a smoke screen (Bjerre, Rec. p. 267), which had obscured the vision of those in the tug's pilot house "to a great extent" (Bjerre, Rec. p. 233), is not the same thing as "practically doing away with it." In one case the smoke screen still prevails to an uncertain and undisclosed degree; in the other, for all practical purposes, it has ceased to exist.

(5) Where petitioner's brief (p. 116) reads:

"Had the shackle not broken the barge would not have come any closer to the island than the tug would have come, between one-quarter and one-half mile (Rec. p. 255), which was a pretty safe distance (Rec. p. 255); in fact, the barge would not have gone so close to the island as the tug would have gone (Rec. pp. 257, 331). The testimony of all the witnesses who testified on the point agrees with the testimony just mentioned."

This point is material. If the above quotation from petitioner's brief correctly states the testimony, it would follow that the finding of the court was corect that:

"Whatever the character and situation of the lookout really was, it was good enough to enable the tug to avoid collision with the island, and it would have enabled the barge likewise to avoid such collision had not the shackle broken" (Rec. p. 732).

But the statement quoted from petitioner's brief does not correctly state the effect of the testimony, as will be seen by the testimony of the following-named witnesses:

Captain Snoddy, for petitioner, testified that nine times out of ten the barge will get caught on the rocks; under the manoeuver of a port helm the barge would get nearer the rocks * * * into the shore (Rec. pp. 665, 666).

Captain E. W. Smith, for petitioner, testified:

If the barge's helm was not ported she would go on the outside of the circle (Rec. p. 608)—that is, nearer the island.

Captain H. R. Smith, for petitioner, testified:

If the barge didn't change her helm she would have headway enough to go into it (the island) * * * until something gave way, of course (Rec. p. 221).

Furthermore, the testimony of "all the witnesses who testified on the point" was not based on the weather and other conditions, including the proximity of the tug to the little island, prevailing at the time and place of collision.

(6) Where petitioner's brief (pp. 62, 63) reads:

> "on the 'Amur' * * * I would not put a lookout on the bridge unless the weather was very thick; if very thick I would put lookout on forecastle head" (Rec. 656).

The witness, Captain Snoddy, had testified that he was at that time on the *Amur* but when asked to describe the precautions a master takes on a tug with a tow, he said:

> "Put a man at the wheel and a man on the lookout."
>
> Q. Whereabouts?
>
> A. On the bridge, unless very thick, then we put him on the forecastle head" (Rec. 656).

(7) The petitioner in its brief (p. 18) in arguing that the trial court made a finding in "affirmative" language in favor of the efficiency of the *Commodore's* lookout, cites from the trial court's decision (Rec. 732) as follows:

> "The *Commodore* * * * did have an experienced man in the pilot house who testified that in fact he did keep constant lookout. * * * Whatever the character and situation of the lookout really was," etc.

The words of the court, omitted by petitioner and for which the first asterisks in the above quotation stand, are:

> "*it is true had not on the bow or in the pilot*

house any one whose sole duty it was to act as lookout, but"

The omitted words are an affirmative finding by the trial court from which the conclusion can be drawn, under the circumstances of the case, that there was not, as a matter of law, an efficient lookout on the tug. Whether such efficiency was the sole or a contributing cause of the collision is another question to be discussed under its proper heading.

(8) Where petitioner states in its brief (pp. 54, 110):

> "The court, in other instances where Croft contradicted Bjerre, Johnson and Dawe, *found that Croft was mistaken* (Rec. 725);"
>
> "The court found (Rec. 724) that Croft was mistaken in his version," etc.

The citations do not bear out the petitioner's statements. Nowhere did the court find that Croft was mistaken. It did say as to the irreconcilability between the testimony of Croft and that of Bjerre, Johnson, Dawe and Smith (engineer):

> "While Croft impressed me as being an honest man, and while I have no doubt that he was testifying according to his best recollections, yet I do not think that the libellant has established that point contended for *by a preponderance of the testimony*" (Rec. 725).

Under this language, the court might have con-

sidered, for aught it appears in its decision, that the evidence on the two sides was in equipoise; in which case, as a matter of law, the decision would be against the party having the burden,

U. S. vs. Lee Huen, 118 Fed. 442, 457,

which, in the instant case, would be with the respondent or petitioner according as this court finds there was or was not an efficient lookout.

One more illustration will suffice. It is typical.

At page 138 of their brief, counsel for petitioner use this language:

> "Foster also says (Rec. p. 59), that he did not drop his anchor until ten or fifteen minutes after the shackle broke. On the same page he also says that the barge was going at the rate of five or six miles an hour at the time the shackle broke, so in fifteen minutes the barge would have drifted about a mile and a half, assuming that it kept its momentum, which no doubt it would do, with the wind blowing thirty miles an hour and the tide flooding in the direction of the island, as Foster says, between a mile and a half and two miles per hour."

This statement of the testimony and this conclusion, if unchallenged, might serve two purposes: first, it would have a tendency to discredit Croft's testimony that the tug was near the breakers of the island just before the wheel was put hard over and the shackle broke; and second, it would tend to

minimize if not eliminate the error in navigation on the part of the tug in getting so far off her course in such a short run.

The record shows:

That Foster testified:

1. That he let the anchor go "probably ten or fifteen (minutes) along there, in that neighborhood" (after the shackle broke) (Rec. 58);

2. That "the tug must have been going pretty good to make that distance in the time she did—five or six miles an hour (Rec. 58). "That is my idea" (Rec. 59);

3. That petitioner's counsel at the trial in stating in the form of an interrogatory that the barge must have drifted a mile and a half after the shackle broke, "got that wrong" (Rec. 59);

4. That the velocity of the tide the night of this incident was: "Oh, I suppose it was a mile and a half or two miles an hour" (Rec. 53).

The record does not show:

That Foster testified that the tide was flooding in the direction of the island.

The record further shows:

That Foster testified:

5. That the flood tides there set "north,—has a tendency that way"—"north and east" (Rec. 51);

6. "That the main trend would be eastward" (i. e., away from Mary Island and towards the mainland) (Rec. 25);

7. "That when the shackle broke the ship was put to port, she is in the trough of the sea—*she has lost her head and she is going sideways with the wind*" * * * she stopped—she is helpless, she is rolling (Rec. 59).

8. That when he first heard the breakers, he (on the deck of the barge a minute and half or two minutes after shackle broke, Rec. 56), was probably five or six hundred feet from them (Rec. 62).

That Bjerre testified:

> "Of course, in the meantime, the barge would drift with the wind on the starboard quarter and *she would lose her headway and blow sideways*" (Rec. 237).

Thus after eliminating the erroneous statement of the testimony of Foster and taking into consideration other testimony of the same witness, corroborated by the testimony of Bjerre, the petitioner's pilot and witness, it is plain that there

is no foundation whatever in fact as shown by the record for the conclusion of petitioner's counsel that the barge kept the momentum of five or six miles, and "so in fifteen minutes the barge would have drifted about a mile and a half."

SIXTH POINT.

That the Exemption Clause of the Towage Contract is Void.

First: Under the general maritime law the tug cannot contract to exempt itself from liability for its own negligence.

While an engagement to tow does not impose upon the tug either an obligation to insure or the liability of a common carrier; and does not require on the part of the tug the highest degree of skill and care, it does require that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services, and to exercise that reasonable skill and care in everything relating to the work until it is accomplished.

The William H. Webb, 81 U. S. 406, 414;
The Margaret, 94 U. S. 494, 496, 497.

In the performance of the service the tug fur-

nishes the direction and motive power; and in guiding and directing, necessarily furnishes pilotage (*The William H. Webb. supra*)—Pilotage not of the highest possible degree of skill and care, but the ordinary skill required of an expert in his profession (*The Dora Allison,* 213 Fed. 645, 646); the same degree of skill and care which is otherwise required of the tug in its navigation. They are pilots. *Hughes, Adm.*, 2d Ed., 130.

In cases where the tow is made up, not by lashing the tow to the tug, but with the tow at the end of a hawser, manned by her own master and crew, as in the case at bar, the towage contract imposes upon the tow a reciprocal duty to exercise reasonable care and skill in following and conforming to the direction of the tug.

Pederson vs. The Jno. D. Spreckels Bros. Co., 87 Fed. 938, 944; U. S. C. C. A. 9th Cir.;

The Jacob Brandow, 39 Fed. 831, 832;

The W. J. Keyser, 56 Fed. 731, C. C. A. 5th Cir.;

Dutton vs. The Express, 3 Cliff. 462.

The want of ordinary skill and care on the part of either tug or tow is a gross fault and the offender is liable to the innocent vessel to the extent of the full measure of the consequences.

These reciprocal duties between tug and tow, while brought into being by a towage contract, are in fact duties imposed by law, independent of contract, and are expressed in the maxim: *Sic utere tuo ut alienum non laedas.*

In the case of *The John G. Stevens*, 170 U. S. 113, 124, 125, where the question arose whether a claim by a tow against her tug for damages caused by the negligence of the latter was founded on a voluntary contract between the owner of the tow and the owner of the tug or founded in tort, arising out of a duty imposed by law, this court, speaking through Mr. Justice Gray, said:

> "The claim by a tow against her tug for damages caused by negligent towage has been held to be founded in tort, arising out of the duty imposed by law and independent of any contract made or consideration paid or to be paid for the towage, by Mr. Justice Blatchford, when district judge, in *The Brooklyn*, 2 Ben. 547, and in *The Deer*, 4 Ben. 352; by Judge Lowell in *The Arturo*, 6 Fed. Rep. 308; and by Judge Swing, in the Southern District of Ohio, in *The Liberty*, No. 4, 7 Fed. Rep. 226, 230. In *The Arturo*, Judge Lowell said: 'These cases of tow against tug are, in form and fact, very like collision cases. The contract gives rise to duties very closely resembling those which one vessel owes to others which it may meet. There is, therefore, an analogy between the two classes of cases so close that the tow may sue, in one proceeding for damages, her own tug and a strange

vessel with which there has been a collision.'" (6 Fed. Rep. 312.) * * * The decisions of this court are in accordance with the latter view, and are inconsistent with any other; * * * This court, more than once, has directly affirmed that a suit by the owner of a tow against her tug, to recover for an injury to the tow by negligence on the part of the tug, is a suit *ex delicto* and not *ex contractu*, citing *The Quickstep*, 76 U. S. 9 Wall. 665, 670; *The Syracuse*, 79 U. S. 12 Wall. 167, 171; and *The J. P. Donaldson*, 167 U. S. 599, 603.

In *The Deer*, 4 Ben. 352, Judge Blatchford said:

"The barge being lawfully where she was, the steamboat owed a duty towards her independent of any contract of towage, and is liable for any damage to her, caused by negligent navigation amounting to a breach of such duty, to the same extent that the steamboat would be liable, for such negligent navigation, to a vessel which she was not towing; or to the barge—if not towing her, and to the same extent that a third vessel would be liable for any negligent navigation, to the barge. *Phil. & R. R. Co. vs. Derby*, 14 How. 468, 485, 486."

To the same effect, *The Goliah*, Hoff Op. 481, 17 Fed. Cas. No. 10106; *The Kate Miller*, 13 Fed. Cas. No. 7282; *The Rebecca*, 1 Ware (188) 187.

A man who undertakes to navigate a ship was pledged to his owners and he and they to all the world, who might be affected for his skill, care and attention. *Stone vs. Ketland*, 1 Wash. C. C. 142.

The case of *The Syracuse*, 12 Wall. 167, is the leading case on the question under immediate con-

sideration. That was a case of a claim for damages to a canal boat by the negligence of the towing steamer within the State of New York in December, 1861.

Before considering that case, we desire to present an outline of the history of the decisions of the courts of that state and of the federal courts sitting within that state, and of the law of the case as it developed during the period when the method of transportation by towage was comparatively modern and the obligations and responsibilities arising out of this kind of navigation novel and peculiar.

In the case of *Alexander vs. Greene,* 3 Hill 9 (1842), a case of towage at owner's risk, the Supreme Court of New York held, that the exemption clause was valid and that the towing vessel, under the contract, was exempt from liability for her own negligence. The case of *Gould vs. Hill,* 2 Hill 623 (1842), holding that a common carrier could not restrict its liability, had not yet been decided. Upon appeal, in *Alexander vs. Greene, supra,* the Court of Errors of New York, 7 Hill 533 (1844), reversed the lower court and held, that the exemption clause was invalid.

In the case of *Wells vs. Steam Nav. Co.,* 2 Comstock (N. Y.) 204 (1849), a case of towage at own-

ers' risk, the court of appeals of New York held, that a tug was not a common carrier; and that bailees, including towing vessels, other than common carriers, could by contract restrict their liability against everything but a loss happening through fraud or want of good faith. Upon appeal, the Supreme Court, 8 N. Y., 375 (June, 1853), reversed the lower court and held, citing 7 Hill 533, that the exemption clause in the contract was invalid.

This was the state of the law as announced by the highest court of New York, when in December, 1861, the cause of action accrued which formed the subject of the litigation in *The Syracuse, supra.*

In the meantime the inferior federal courts, sitting in that state, had been called upon to pass upon the same question.

In the case of *The Express,* Betts, J., in the Southern District, Olc. 258, 8 Fed. Cas. No. 4598 (1846), a case of damage to a third vessel by a canal boat under tow of a tug, the court held the tow liable for bad steering and dismissed the libel suit against the tug.

In the case of *The Princeton,* Betts, J., in the Southern District, 19 Fed. Cas. No. 11433a, a case of towage "at the risk of master and owners," the court

found that there was no gross negligence or intentional misconduct but there was want of due skill and ordinary prudence on the part of the towing vessel, and on the strength of *The Express*, Olc. 258, Fed. Cas. 4598, and *Wells vs. Steam Navigation Co.*, 2 Comstock (N. Y.) 204, held the steamer a common carrier with a right to limit her liability by contract, under *N. J. Steam Nav. Co. vs. Merchants' Bank*, 6 How. 344. Upon appeal, 3 Blatchf. 54 (1853) the court, Nelson, Circuit Justice, declined to pass on the validity of an express exemption clause as not arising in the case, but held that an agreement to be towed, "at the risk of the master and owners" of the tow, did not exempt the tug from proper and reasonable care, and found the burden of proof resting on the tow of establishing want of ordinary skill and diligence on the part of the tug had not been sustained, and affirmed the decree of the lower court.

With this state of certainty and uncertainty in the state and federal courts, respectively, as to what the law was, the case of *The Syracuse* arose.

THE SYRACUSE.

This case (*sub. nom. Langley vs. The Syracuse*) originated in the U. S. District Court for the South-

ern District of New York and was an action *in rem* brought by the master and owner of a canal boat against the steamer *Syracuse* to recover damages sustained December 1st, 1861, by the sinking of the canal boat while in tow of and through the neglect of the *Syracuse* in rounding from the North River into the East River, in New York State, under a contract containing the words, "at the risk of her owners," which words, Betts, District Judge, held: "Did not operate to relieve or discharge the steamboat and her owners from the exercise of all reasonable skill, attention, fidelity and precaution in the performance of the trust of hiring and transportation upon which she was engaged." 14 Fed. Cas., No. 8068 (March, 1867).

An appeal was taken to the U. S. Circuit Court, where Circuit Justice Nelson, in affirming the lower court, said: "One ground of defense set up is that, by the contract of towage, it was agreed that the canal boat was to be towed by the steamer at her own risk. The answer to this is, that this contract does not exempt the steamboat from liability for damages caused to the canal boat by the negligence of those in charge of the steamboat." 6 Blatch. 2; 23 Fed. Cas., 13, 717 (Nov. 27, 1867).

On an appeal to this court, Mr. Justice Davis,

speaking for the court, said: "It is unnecessary to consider the evidence relating to the alleged contract of towage, because if true, as appellant says, that by special agreement, the canal boat was being towed at her own risk, nevertheless, the steamer is liable if, through the negligence of those in charge of her, the canal boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting upon a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution and maritime skill, and if these are neglected and disaster occurs, the towing boat must be visited with the consequences." 12 Wall. 167, 171 (1871).

The rule thus established in *The Syracuse* has been followed in the

First Circuit:

The Somers N. Smith, 120 Fed. 569.

Second Circuit:

Deems vs. Albany & Canal Line, 14 Blatchf. 474;

The M. J. Cummings, 18 Fed. 178;

The Jonty Jenks, 54 Fed. 1023;

The Edmund L. Levy, 128 Fed. 683, C. C. A., 2nd Cir.

The W. G. Mason, 142 Fed. 913, C. C. A., 2nd Cir.

The Oceanica, 144 Fed. 301, District Court;

In re Moran, 120 Fed. 556, 558.

Third Circuit:

The Rescue, 24 Fed. 190;

Ulrich vs. The Sunbeam, 24 Fed. Cas. 14329;

in these two cases the rule of *The Syracuse* followed, but the case not cited;

Sixth Circuit:

The American Eagle, 54 Fed. 1013.

Seventh Circuit:

The Temple Emery, 122 Fed. 181.

Ninth Circuit:

Alaska Coml. Co. vs. Williams, 128 Fed. 362, 366, C. C. A., 9th Cir.;

The case at bar, 268 Fed. 449, C. C. A.

The Syracuse has been cited in

McCormick vs. Shippey, 119 Fed. 226,

and cited and disregarded in

The Oceanica, 170 Fed. 893, C. C. A. 2nd Cir., certiorari denied by this court, 215 U. S. 599;

and disregarded, though not cited, in

Monk vs. Cornell Steamboat Co., 198 Fed. 472, C. C. A., 2nd Cir., following *The Oceanica,* 170 Fed. 893;

Ten Eyck vs. Dir. Genl. of Railroads, 267 Fed. 974, C. C. A., 2nd Cir., following *The Oceanica,* 170 Fed. 895; certiorari denied by this court, 254 U. S. 646.

The only other case in the inferior federal courts bearing on the question, which diligent search has disclosed, is the case of *M. P. Doullut & Son vs. Gen. Con. Co.,* 221 Fed. 877, C. C. A., 5th Cir., where on account of the condition of certain piles to be towed, containing an unusual number of "sinkers," the owner assumed the risk of towage; and the court, reversing the lower court's decree awarding damages to the owner for loss of piles, dismissed the libel.

In the case of *McCormick vs. Shippy, supra,* a case of the demise of a yacht under a charter party providing "that the charterer shall assume no responsibility for loss or damage," the district court (119 Fed. 229) held, that there was a demise of the vessel and while the master through whose negligence the yacht was lost was the servant of the charterer, the stipulation by which the risk of loss was assumed by the owner was not against public policy and relieved the charterer from liability. Upon appeal to the circuit court of appeals, 124 Fed. 48, that court in affirming the decree held, that the charterer was a *bailee for hire,* responsible only for ordinary diligence and liable for ordinary negligence in the

care of the property *bailed,* citing *Clark vs. U. S.,* 95 U. S. 539; *Sun Ptg. & Pub. Co. vs. Moore,* 183 U. S. 642.

THE OCEANICA.

In *The Oceanica,* 170 Fed. 893, the circuit court of appeals expressly declined to follow *The Syracuse,* the reasoning of the majority opinion being: (1) That under the law of the State of New York, a common carrier may contract against its own negligence when the intention to do so is expressly stated; the stipulation having something besides negligence to apply on, viz, carrier's liability as insurer, it is not to be supposed the parties intended to cover carrier's liability for his own negligence unless so expressed; (2) that such was the rule of this court, *N. J. Steam Nav. Co. vs. Merchants' Bank,* 6 How. 344, until in *R. R. Co. vs. Lockwood,* 17 Wall. 357, it was declared, on the ground of public policy, that a common carrier could not so contract; (3) that a tug, not being a common carrier, only bound to exercise ordinary care, a contract against liability for negligence cannot be construed, in the case of a tug as it may be in case of a common carrier, the tug only being liable for negligence, if tow assumes all risks, no risk is meant but the tug's negligence; (4)

that such contracts, in other relations than that of tug and tow had been held to cover negligence, citing:

The Fri, 154 Fed. 333, C. C. A., 2nd Cir.;
McCormick vs. Shippy, 119 Fed. 226;
Same case, 124 Fed. 48;
Chi., etc., Ry. Co. vs. Wallace, 66 Fed. 506;
Long vs. R. R. Co., 130 Fed. 870;
Bates vs. R. R. Co., 147 Mass. 255;
Hosmer vs. R. R. Co., 156 Mass. 506;

and (5) that they could see no reason why they should be differently construed between tug and tow. That is to say, as we read the opinion, that the law of New York permits the common carrier to restrict its liability by contract, and it follows as a matter of course, that private carriers may do the same; that such was the law in the federal domain as announced by this court in *N. J. Steam Nav. Co. v. Merchants' Bank,* until in *R. R. Co. vs. Lockwood,* it overruled the former case; and that, as the Lockwood case affected only common carriers, it followed that the right of private carriers to so contract still obtained. The authorities cited in that majority opinion in *The Oceanica case* sustain this construction of it. The case of *McCormick vs. Shippy,* cited, was, as we have seen, one of a demise of a vessel.

But under such a charter, as this same circuit court of appeals said in the same case, on appeal, the charterer was a *bailee for hire.* The cases of *Ry. Co. vs. Wallace* and *Long vs. R. R. Co.,* cited, were both cases of private carriers as *bailees for hire;* and the Massachusetts cases cited were cases of *bailees for hire;* the case of *The Fri,* cited, was one concerning the carriage of cattle between ports other than ports of the United States, under a charter party which gave to charterer the full capacity of the vessel. The contract was made abroad to be performed wholly abroad, notwithstanding which, the bill of lading issued provided the carriage should be subject to the terms of the Harter Act. The court held, that the owner was not a common carrier but a *bailee* to transport as a *private carrier for hire* (154 Fed. 338), and that the exemption clause in the bill of lading, against negligence, of owner's master, valid under the laws of the country where issued, was not invalid as in conflict with the Harter Act because that act applied only to carriage to and from ports of the United States.

On a rehearing in *The Oceanica,* answering the proposition urged by libellants that even if the owner of the towing vessel in a suit *in personam* could not be held because of the exemption clause

still the vessel herself was liable *in rem,* the court, while admitting a suit *in rem* for negligence was a suit *ex delicto,* even if there was a contract between the parties, held, such fact did not nullify the contract and in support of the rule that if the owner is exempted by contract so also is the vessel, cited the case of *The Queen of the Pacific,* 180 U. S. 49, a libel for breach of contract of affreightment, where the only point considered and decided in this court was that the libellants did not, as required by the terms of the bills of lading, present to the issuing company owning the vessel their claims for damages within the thirty days prescribed by the bills of lading so to do, and this court held, that the limitation was a reasonable one and applied as well to the vessel as to the corporation owner and its stockholders, though in the documents that limitation was expressed as to the owners and stockholders and not as to the vessel. In *Monk vs. Cornell Steamboat Company,* 198 Fed. 472, C. C. A., 2nd Cir., as the court found that there was no negligence on the part of the tug, though *The Oceanica* was and *The Syracuse* was not cited, any reference to the validity or invalidity of an agreement for exemption for negligence would be *dictum.* In *Ten Eycke vs. Dir. Genl. of Railroads,* 267 Fed. 974, C. C. A., 2nd Cir., a written notice from respondent was brought home to

the owner *pro hac vice* of the towed vessel that in all towage performed by tugs of the respondent, the master and crew of the tug in the performance of such service should *become* the servants of and identified with the vessel towed. Of course one cannot complain of another for the negligence of his own servants; and the negligence of the owner of the tug, under such contract, could not be predicated upon the negligence of the servants of the owners of the towed vessel.

The circuit court of appeals for the second circuit, in a case decided prior to *The Oceanica, The W. G. Mason*, 142 Fed. 913, a case of negligent towage, held the cause of action to be not one for breach of contract, but for breach of a duty imposed by law independent of contract and founded in tort, citing *The Syracuse* and *The John G. Stevens, supra;* and in a case subsequent to *The Oceanica, The Lafayette*, 269 Fed. 917, 927, a case of a collision between two stranger vessels, that court said:

> "These actions, arising out of a maritime tort and giving rise to a maritime lien, are not subject to the rules of the common law courts or to the statutes of the State of New York. We are dealing with a maritime tort and the rights of the parties are to be determined upon the principle of the maritime law. The lien which is claimed is not one created by any state."

The court correctly announced the rule in *The W. G. Mason,* disregarded that rule, though applicable, in *The Oceanica,* and reaffirmed the rule in *The Lafayette.*

The decision in *The Oceanica,* and the cases there cited on Page 895, beginning with *The Fri,* given above, are all based upon the principle that a private carrier or a common carrier acting in the capacity of a private carrier may lawfully restrict its liability for negligence, a late expression of which doctrine is found in the case of *S. F. P. & P. Ry. Co. vs. Grant Bros. Cons. Co.,* 228 U. S. 177.

Tugs are not bailees.

But we respectfully submit that the conclusion that, because private carriers may contract to restrict their liability for their own negligence, therefore a tug may so contract, can only be drawn where the minor premise is that the tug in performing a towage service is a private carrier.

Such a premise would be a false premise.

Tugs in performing towage service, particularly at the end of a tow line and where the towed vessel is in charge of her own master and crew, are not carriers, either common or private, and are not bailees for hire.

In a bailment, there must be a delivery by the bailor and an acceptance by the bailee. Exclusive possession and control of the thing bailed must be given to and accepted by the bailee or his agent. Such delivery and acceptance is the very foundation of the law of bailment as applied to carriers.

No. Pac. Ry. Co. vs. McFadden, 154 U. S. 155, 160.

This rule is as applicable to private, as to common, carriers.

In the instant case, the towage contract called for direction and motive power on the part of the tug; and in the execution of that contract there was no "delivery" of the tug and its cargo; no such surrender of the exclusive possession and control by her owner to the owners of the tug, as between shipper and carrier, as would constitute a bailment.

Paragraph 3 of the towage contract emphasizes the fact that the tug's owners declined the duty and obligation of a bailee.

It is true that in some of the lower federal courts a tug, in the performance of a towage service, has been held to be a bailee for hire. *The Merrimac*, 2 Sawy. 586; *Bust vs. Cornell Steamboat Co.*, 24 Fed. 189; *Doherty vs. Penn R. Co.*, 269 Fed. 959, 962;

McWilliams Bros. vs. Dir. Genl. of Railroads, 271 Fed. 931, 932.

In *The D. Newcomb,* 16 Fed. 274, where the tow was lashed to the tug, the tow was held to be in the actual possession and control of the tug and the owner of the tug was held to be a bailee for hire.

In *Wells vs. Steam Nav. Co.,* 2 Comstock (N. Y.), 204, 208, it was held to be

> "a misnomer to call defendants common carriers, or carriers of any kind in relation to the business of towing boats. Nor are they bailees of any description; for the property is not delivered to them, nor placed within their exclusive custody or control. It remains in the possession, and for most purposes, in the exclusive care of the owners or their servants. There is no bailment within any definition of that term to be found in the books."

Some doubt was expressed by Judge Betts, in *The Princeton,* 19 Fed. Cas. No. 11433a, where he held that the owners of the towing vessel have not imposed upon them any higher obligation *than that* of bailees for hire:

> "that the service is not assumed in the character of a carrier, if in law he is one, but only on the stipulations of the contract."

But in the case of *Eastern Transportation Line vs. Hope,* 95 U. S. 297, a case arising out of a towage contract and the loss of a barge through the neg-

ligence of the towing vessel, where the plaintiffs in error, defendants below, had requested in the trial court an instruction to the jury that the plaintiff's barge was within the possession and exclusive control of her owners and that the defendants were not *bailees* of the barge nor was the barge placed within their exclusive custody and control, on appeal, this court, in considering that question, speaking through Mr. Justice Hunt, said:

> "While it was very well to ask a charge that the transporter [owner of the towing vessel] of the boat was not a bailee and that perhaps that the boat was not within his exclusive control * * * it was quite incorrect to ask a charge that the boat was within the possession and exclusive control of her owners. The Transportation Company did not occupy the position of a common carrier, and did not have that exclusive control of the barge which that relation would imply. It did not employ or pay the master and the men in charge of her, nor did it exercise that internal control of her cargo, its storage, its protection and the like, which belonged to a bailee. * * * "

In *The J. P. Donaldson*, 167 U. S. 599, 603, 604, a case of towage, Mr. Justice Gray, speaking for the court, said:

> "But the barges in tow are by no means put under the control of the master of the tug to the same extent as the tug herself and the cargo, if any, on board of her * * * [quoting from *Eastern Transp. Line vs. Hope, supra,* partly as

above] * * * It is solely for the purpose of performing the contract of towage that the vessels towed are put under the control and management of the master of the tug. In all other respects, and for all other purposes, they remain under the control of their respective masters; and in case of unforeseen emergency, it is upon the master of each that the duty rests of determining what shall be done for the safety of his vessel and of her cargo. If the question arises whether it is safer for one of the barges to continue in tow, or to cut loose and anchor, the decision of that question ultimately belongs to her own master, and not to the master of the tug. And if the question presented is either whether the barge should be run ashore for the purpose of saving her cargo, or else whether a part or the whole of the cargo of the barge should be sacrificed in order to save the rest of her cargo or the barge herself, the decision of the question whether such stranding or jettison should or should not be made is within the exclusive control of the master of the particular barge, and in no degree under the control of the master of the tug; and in either case any right of contribution in general average cannot extend beyond that barge and cargo."

Reciprocal duties of tug and tow preclude a bailment.

And lastly, we submit, that the law of reciprocal duties of tug and tow is inconsistent with, and precludes the existence of, the relation of bailor and bailee.

Had there been, in the instant case, such a de-

livery of tug and her cargo as gave the owners of the tug actual, physical possession and exclusive control, as in the case of *The D. Newcomb, supra,* the reciprocity of duties would never have arisen; there would have been no agency through which such duties could be discharged on the part of the owners of the barge and her cargo. The law would not, in such a case, divide the duty and obligation as between the owners of the tug and the owners of the tow and her cargo. It would rest entirely upon the owners of the tug upon their acceptance of delivery of the tow and her cargo.

No. Pac. Ry. Co. vs. McFadden, 154 U. S. 155, 160.

Maritime Law Extended to Alaska: By Act of Congress, Aug. 24, 1912, Ch. 387, Sec. 3, 37 St. L. 512, the Constitution of the United States and all the laws of the United States not locally inapplicable were declared to have the force and effect within the territory of Alaska as elsewhere in the United States. This, of course, would include the general maritime law as adopted in this country, if it had not theretofore been extended to Alaska.

The Policy of the Law: Nor has the policy of the law, as announced in *The Syracuse* by this court, been changed or modified by Congress as to tugs and

tows by the enactment of the Harter Act. That Act, affecting as it does the relation between a ship and its own cargo, has no application to the relation between tug and tow belonging to different owners.

Balti., etc., Barge Co. vs. Eastern Coal Co., 195 Fed. 483, C. C. A., 1st Cir.

> "In determining the effect of this statute (the Harter Act) in restricting the operation of general and well-settled principles, our proper course is to treat those principles as still existing, and to limit the relief from the operation afforded by the statute to that called for by the language of the statute itself."

The Irrawaddy, 171 U. S. 187, 195.

Second: The towage contract expressly negatives exemption from liability for negligence on the part of the tug.

The contention of petitioner that the closing sentence of Paragraph 3 of the towage contract, to-wit:

> "The Tug Company is not to be held liable for any damage which might happen to the said barge *Bangor* or its cargo while in tow or at anchor,"

has the effect of relieving the tug from liability for its own negligence, is inconsistent with the preceding part of that paragraph, which provides:

> "That the tug will render to the said barge *Bangor* reasonable assistance from time to time

in any emergency which might arise, and whilst discharging at Anchorage the tug is to be within call of the barge at all times to render such reasonable assistance in case of any emergency which may arise."

Any negligence on the part of the tug imperiling the tow and her cargo to their loss or damage would create an emergency with respect to them, calling for the exercise of reasonable assistance on the part of the tug as a matter of law, irrespective of the "reasonable assistance" clause, and expressly stipulated for by that clause.

The effect of the so-called exemption clause, giving it the construction contended for by petitioner, taken in connection with the "reasonable assistance" clause, that is, taking Paragraph 3 as a whole, was to leave the tug, so far as its liability for its own negligence was concerned, just where it would be had there been no Paragraph 3 in the contract, that is, with all the obligations and liabilities imposed upon it by law.

The attempt to restrict liability for negligence, if such is the construction to be placed on the exemption clause standing alone, was negatived by the "reasonable assistance" clause.

In construing Paragraph 3 the court will bear in mind that the contract was prepared, executed

and forwarded by petitioner to respondent, that the language is of petitioner's own choosing; the construction to be given that language will be that most strongly against petitioners.

The Caledonia, 157 U. S. 124, 137.

An emergency within the meaning of Paragraph 3 arose when the tug, with the barge in tow, found herself almost in the breakers of Mary Island, a position of great peril to both tug and tow. In that emergency, to extricate herself, the tug, without warning to the barge, suddenly put her wheel hard aport, thereby putting an excessive strain on the tow line and shackle. It was the duty of the tug, as well as its stipulated agreement, in such emergency to warn the barge of its sudden manoeuvre so that the barge might conform thereto, thereby lessening the excessive strain on the tow line and shackle by the sudden turn of the tug. The tug failed to give such warning and that failure was characterized by the appellate court as gross negligence resulting in the casualty to tow and her cargo. The appellate court further found that had the tug given such warning the barge would have been able to conform and would have probably gone clear.

In the case of *The Monarch,* 235 Fed. 795, 796, 799, the towage contract provided:

"It is understood that the entire tow is under the order and supervision of the Clooney Construction Company and in performing this work the I. H. Aiken Towboat Company shall use every means for the safety and safe delivery of each tow specified but are in no way to be held responsible for the same."
The court said:

"Taking the contract as a whole, its limitation of liability for any cause, as well the obligation of the tug to 'use every means' resolves itself in the last analysis to a mere reiteration of the maritime law. This would throw no responsibility on the tug for injuries to the tow save those due to her own negligence. The tug could not contract away its liability for negligence."
To same effect:

Elderslie S. S. Co. vs. Borthwick (H. of L.), 10 Asp. Mar. Cas., N. S. 24, 26,

where, in construing a contract of affreightment which contained an exemption clause relieving ship, owners and charterers from liability for negligence of the master or other person in the service of owners or charterers, and also contained a provision that excepted loss or damage from defects in hull, etc., if reasonable means had been taken to provide against such defects, the Lord Chancellor (Halsbury) said:

"I can give no other construction to it than that which the words express, but the difficulty which is in the way of course is this: That he has thought proper to execute an instrument which has two different sets of phrases in it;

and one rule of construction which I think must prevail, is that you must give effect to every part of a document if you can—you must read it as a whole. He says, at the commencement of it that he is not to be liable for this particular thing; but in another part of the same instrument you find another set of words which also you have to construe * * * we must remember that this is one contract; and each of the parts of this contract must be read so as to be intelligible and to be reconciled with the others if it can be. The true construction of the clause is, according to my view, that he is to be exempted from any liability for the particular injury that has happened, and if that stood alone I should have thought it perfectly clear that he was not to be liable; but instead of that, he goes on to say in another part of the same contract, to which I must, if I can, give some effect because of that rule of construction from which I cannot escape: 'I shall not be liable for this same injury (as I must call it) if all reasonable means have been taken to avoid it.' The only mode of reading as an entire contract that instrument which has those two stipulations in it, is to suppose that you must read the first part of it thus: 'I am not to be liable for this,' and then what comes after it by way of exception, 'I shall not be liable unless I have failed to take all reasonable means against the injury that has happened.' In that way you can read the two together, and you can make a reasonable contract out of it."

In the case at bar, reading the towage contract as a whole so as to give effect to each stipulation contained in paragraph 3 and to reconcile apparently contradictory stipulations, we must read it: "The

Tug Company is not to be held liable for any damage which may happen to barge or its cargo if the tug shall have rendered reasonable assistance in an emergency." Conversely, the tug is to be held liable for damage happening to barge or cargo if the tug fails to render reasonable assistance in an emergency giving rise to such damage.

Third: Under the local law of Alaska the tug, in towing the barge in Alaskan waters, was subject to all of the obligations and liabilities of a common carrier.

The contract called for a towage service in the waters of British Columbia and Alaska; and the negligence complained of occurred in Alaskan waters.

If it should be contended that the federal courts, including this court, in the case of *The Syracuse,* in declaring a towing vessel could not exempt itself from liability for its own negligence, were applying the local law of the State of New York where the cause of action in that case arose, then in force as announced, 1853, in *Wells vs. Steam Nav. Co.,* 8 N. Y. 375; and that the United States Circuit Court of Appeals for the Second Circuit, in the case of *The Oceanica,* in declaring such exemption valid, was applying the local law of that state, where the cause

of action in the latter case arose, then in force; and therefore that the question of the validity of the exemption clause in the towage contract in the instant case should be determined by the local law of the place where the cause of action arose, such contention, disregarding the doctrine in *Workman vs. Mayor, etc., of New York,* 179 U. S. 552, holding that the general maritime law as adopted in this country controls, as against the local law, in determining the liability for injury by one vessel to another, within a state, such contention, even if well taken, would avail the petitioner nothing for the reason that the local law of Alaska in force in March, 1917, whatever else it provided, provided that a tug boat towing for hire in Alaskan waters was a common carrier and, therefore, the tug could not restrict by contract its liability for negligence.

(1) The Act of Congress approved May 17, 1884, Chap. 53, 23 St. L. 24, 25, entitled "An Act providing a civil government for Alaska," provides, *inter alia:*

> "Sec. 7. That the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable, and not in conflict with the provisions of this act or the laws of the United States. * * * "

(2) The general laws of Oregon, in force May 17, 1884, provided, *inter alia*:

> "Section 1. Any tug-boat towing for hire in any of the waters of this state is a common carrier for the business of towing vessels.
>
> Sec. 2. It shall be unlawful for the master or owner of any such tug to refuse to tow any vessel of the class usually towed by such tug, or to discriminate either in the charges for towing or in time; but they shall tow all such vessels in the order in which they may be announced ready; *Provided*, that towing in or out of a bar harbor may take precedence over towing inside of such harbor.
>
> Sec. 3. * * * (Penal.)
>
> Sec. 4. * * * (Penal.)"

An act entitled :'An Act to prevent tug boats from discriminating between vessels,' General Laws of Oregon, The Laws of Oregon, etc., of the Eleventh Regular Session of the Legislative Assembly thereof. Salem, Oregon, W. H. Odell, State Printer. 1880. Published by authority. P. 26, approved October 25, 1880.

Hill's Annotated Laws, Oregon, 1887, Sec. 1975; Ballinger & Cotton's Annotated Codes and Statutes of Oregon, 1902, Sec. 2110; Olsen's Oregon Laws, 1920, Sec. 2190; Lord's Laws of Oregon, Sec. 2190.

The principal efficiency of the Oregon Act of 1880 was remedial, not penal.

The Oregon Act of 1880, extended to Alaska by the Act of Congress, May 17, 1884, was in force in

Alaska in March, 1917, for it was not repealed:

(a) By the Act of Congress, approved March 3, 1899, Ch. 429, 30 St. L. 1253, entitled:

> "An Act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said District,"

which, while it repealed by implication so much of the general laws of Oregon extended to Alaska by Act of 1884, including Sections 3 and 4 of the Oregon Act of 1880, as related to crimes and their punishment and to criminal procedure, will not be extended beyond a positive repugnancy between its provisions and the laws of Alaska embraced in the Oregon Act of 1880.

(b) By the Act of Congress, approved June 6, 1900, Ch. 786, 31 St. L. 321, entitled:

> "An Act making further provision for a civil government for Alaska and for other purposes,"

which provided, *inter alia*:

> "Sec. 368. * * * All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed."

The title, the repealing clause, and the content of the Act of 1900, as aids to the construction of that act, impel the legal conclusion that the later statute

(Act of 1900) did not repeal the prior statute (Act of 1884).

The *title* of the act: "An Act making *further* provisions for a civil government for Alaska and for other purposes," speaks for itself.

Revenue Cutter No. 1, Brown, Adm. 76.

The *repealing clause* that "all acts and parts of acts in conflict with the provisions of this act are hereby repealed," precludes an implication of more extensive repeal than the express declaration of the legislative intent; the strong implication is that there may be acts upon the same subject which are not thereby repealed.

Holden vs. Minn., 137 U. S. 483, 491;

Gr. No. R. R. Co. vs. U. S., 208 U. S. 452, 466.

> "Where two statutes cover in whole or in part the same matter and are not absolutely irreconcilable, the duty of the court, no purpose to repeal being clearly expressed or indicated, is if possible, to give effect to both."

Frost vs. Wenie, 157 U. S. 46, 58.

As to the *content* of the later act, the general laws of Oregon not inapplicable, extended to Alaska by the Act of 1884, included, besides the code of civil procedure, provisions on many subjects, among others, the following:

Assignment for benefit of creditors;

Specific performance of contracts;
Private corporations, formation of;
Incorporation of churches;
Quarantine of vessels;
Wharfingers and warehousemen;
Liens on boats and vessels;
Regulating tugs as common carriers.

None of these subjects were included in the later Act of 1900.

Taking one of these subjects—that of corporations—notwithstanding that no provision is made in the later statute (Act of 1900) for the formation of corporations in Alaska, that Act does contain the following provisions relating to private corporations:

> "Title II., Sec. 338. An action may be maintained * * * against a corporation, either public or private, for the purpose of avoiding the act of incorporation, or the act renewing or modifying its corporate existence, on the ground that such act or either of them was procured upon some fraudulent suggestion or concealment of a material fact * * * or for annulling the existence of such corporation, *when the same has been formed under the general law operating in this district therefor* on the ground that such incorporation, or any renewal or modification thereof, was procured in like manner. (Italics ours.)
>
> "Sec. 339. An action may be maintained

* * * for the purpose of avoiding the charter or annulling the existence of such corporation whenever it shall

"First. Offend against any of the provisions of the acts or either of them, creating, renewing, or modifying such corporation or the provisions of any general law under which it became incorporated. * * * "

31 St. L. 389.

Sec. 349. If judgment be given against a corporation the effect of which is that such corporation shall cease to exist, * * * it shall be the duty of the United States Attorney to cause a copy of the judgment roll to be filed with the officer issuing the certificate of incorporation * * * .

31 St. L. 389, 391.

It is significant that sections 337-350 of Chap. 36, Title II, Act of 1900, including those just quoted, are identical, *mutatis mutandis*, with sections 351-364a, Laws of Oregon, Act of October 11, 1862, 1 Hill's Ann. Laws of Oregon, 1887, sections 354-368; and were in force May 17, 1884, when the general laws of Oregon were extended to Alaska by Act of 1884.

If so much of the general laws of Oregon extended to Alaska as provided for the formation of private corporations (not being included in Act of 1900) was repealed by the Act of 1900, there would

remain no general law for the formation of corporations then operative in Alaska, which could be offended against under penalty of the provisions of the law just quoted, part of Act of 1900.

The incorporation in the Act of 1900 of some of the general laws of Oregon theretofore by Act of 1884 extended to Alaska, may have been and no doubt was for the purpose of placing those particular sections so incorporated, in a concrete form and make them available to the courts, members of the bar and the inhabitants generally of Alaska, where, prior to the passage of the Act of 1900, they were practically inaccessible.

Had it been the intention of Congress to repeal all the general laws of Oregon previously extended to Alaska which were not included in the Act of 1900, it would have expressed that intention, not by the formula: "All acts and parts of acts in conflict with this act are hereby repealed" but by the formula: "All laws and parts of laws that come within the meaning and purview of this act are hereby repealed."

Hess vs. Reynolds, 113 U. S. 73, 79.

Here we have a provision of the later statute operating upon conditions arising under the prior statute, conditions arising not only prior but *subse-*

quent to the enactment of the later statute. The language of Section 338 quoted above, referring to annulling the existence of a corporation *"when the same has been formed under the general laws operating in this district therefor"* fairly admits of such construction.

In *Alaska Gold Mining Co. vs. Ebner,* 2 Alaska Rep. 611, the District Court of Alaska, First Division, held that the Oregon laws for incorporation of domestic corporations, extended to Alaska by Act of 1884, not being in conflict with the Act of June 6, 1900, were not repealed, and remained in force.

(c) Or by the Act of Congress approved Aug. 24, 1912, creating a legislative assembly in Alaska, which provides, *inter alia*:

> "That the Constitution of the United States and all the laws thereof which are not locally inapplicable, shall have the same force and effect within said Territory as elsewhere in the United States; * * * that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature. * * * " Ch. 387, Sec. 3, 37 St. L. 512.

In *Summers vs. U. S.,* 231, U. S. 92, 104 (1913) this court, speaking through Mr. Justice McKenna, had occasion to say that if certain laws of Oregon were applicable before the enactment of the Code of

Criminal Procedure for Alaska (Act of 1899), they were still applicable. That is to say, as we read the opinion, that there had been no general repeal of the Act of 1884 extending the general laws of Oregon to Alaska.

(3) The Oregon Act of 1880

(a) Was not in conflict with the Constitution of Oregon, which provides, Article IV, Sec. 20,

> "Every act shall embrace but one subject, and matters properly connected therewith, which subjects shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."
>
> *1 Hill's Ann. Laws of Oregon,* 1887, p. 90;
>
> *1 Ball. & Cotton's Ann. Codes and Stat. of Oregon* (1902), p. 41.

The Supreme Court of Oregon, in *Eastman vs. Logging Co.*, 69 Or. 1, 138 Pac. 216, 219, in construing Article IV., Sec. 20, of the Constitution of that State, quoted approvingly, as applicable to that section, from the Supreme Court of Minnesota, as follows, with italics as given:

> "The term 'subject' as used in the constitution is to be given *a broad and extended meaning so as to allow the Legislature full scope to include in one act all matters bearing a logical or natural connection.* * * * All that is necessary is

that the act should embrace *some one general subject,* and by this is meant merely that all matters treated should fall under some *one general idea,* be so connected with or related to each other, either logically or in popular understanding as to be part of, or germane to, one general subject."

And in *Clayton vs. Enterprise Elect. Co.,* 82 Or. 149, 161 Pac. 411, 414, the same court said:

> "To render a portion of a statute void because its provisions are not embraced within the title as required by Art. IV., Sec. 20, the provisions must be entirely disconnected with the subject, wholly incongruous, and consist of matter of which the title gives no notice so that the adoption of the measure by means of the title would be fraudulent. The presumption is always in favor of the validity of a statute and its repugnancy to the constitution must clearly appear."

In *Wind River Lumber Co. vs. Insurance Co.,* 196 Fed. 340, the Circuit Court of Appeals for the Ninth Circuit, construing the same section, said:

> "If all parts of an act relate even indirectly to the general subject of the act, or if the subjects are not separate and distinct but are so connected with each other as to be germane to the primary object of the statute, the act should not be held unconstitutional."

Let us apply this principle of construction to the Oregon Act of 1880. The Act was an implied declaration on the part of the Legislature that the busi-

ness of towing for hire in the waters of Oregon was affected with a public interest; and, under its police powers, the state thereby exercised control to prevent discrimination in that business by declaring it unlawful for a tug towing for hire to refuse a vessel of the class usually towed by such tug or to discriminate in the charge for towing or in time, and requiring that the tug should tow all vessels in the order in which they should be announced ready.

The subject of the Act, its sole purpose, definitely expressed in its title, was to prevent tug boats from discriminating between vessels.

The effect of the provisions of the second section of the Act was to sweep away the private character of the business of towing for hire in the waters of Oregon, uncontrolled and unregulated, and to invest that business with a public character, charged with the duty of serving all who might choose to employ the tug for towage service, without discrimination as to charge or as to time of service, in the order in which vessels should be announced ready, thereby *proprio vigore* investing the tugs towing for hire with a status similar to that of a common carrier, which, in the absence of legislative provisions prescribing a different rule, are responsible as insurers.

The Lady Pike, 21 Wall. 1, 14;

Liverpool, etc., S. Co. vs. Phoenix Ins. Co., 129 U. S. 397, 440;

The Niagara vs. Cordes, 21 How. 7, 23;

Railroad Co. vs. Lockwood, 17 Wall. 357, 377;

Jahn vs. S. S. Folmina, 212 U. S. 354, 361.

> "A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests. * * * The owner of a general ship carrying goods for hire, whether employed in internal, coasting or in foreign commerce, is a common carrier with the liability of an insurer" (*Liverpool, etc., S. Co. vs. Ins. Co., supra*),

and the rule applies as well to a vessel required by law to serve all as to a vessel voluntarily put at the service of all by her owner.

The designating such tugs as common carriers, in the first section of the Act, added nothing to the provisions of the second section and contained nothing that was not put in effect by the second section; that designation was rather a declaration of the legal effect of the provisions of the second section, therefore germane to the subject treated in the second section and expressed in the title.

The petitioner's tug *Commodore,* at the time of the disaster, was engaged, under its towage contract, in towing for hire in Alaskan waters within the meaning of the Oregon Act of 1880 as applied to

Alaska; it had further towage service to render under that contract during 1917; it had made thirty round trips in Alaska waters during the three years of 1915, 1916 and 1917, at the time of the trial in November, 1917.

If it should be urged that the Oregon Act of 1880 applied only to domestic tugs of Oregon, owned and operated in Oregon, the answer is that there is no such distinction to be found in the statute. The State of Oregon was acting within its powers in legislating for a uniformity of liability of all tugs which might tow for hire within its waters, thereby denying to tugs from the neighboring states of California and Washington and from British Columbia, towing for hire in Oregon, immunity from the liability imposed on her own tugs. The statute does not expressly or impliedly interfere with the business of an outside tug coming into the waters of the State of Oregon. When such a tug, under a towage contract, visits that state there is nothing in the statute to prevent it from departing therefrom at any time; and nothing which requires such tug to throw up its then present engagement. If the outside tug enters the waters of the state seeking business, then, under the statute, it must, until it departs therefrom, which it is at liberty to do at any time, serve all who

apply for service without discrimination in charge or time, so far as the federal navigation laws will permit; and such tug in any towage service in the waters of the state is subject to the same liability that a locally owned tug would be subject to, under that statute, in performing the same service.

(b) Was not in conflict with the Commerce Clause of the federal Constitution, as encroaching upon the exclusive powers of Congress; for the subject matter of the Oregon Act of 1880 was not one which required one uniform system or plan of regulation throughout the United States; but, like the subject of pilotage, wharfage, etc., was within the police powers of the state.

Cooley vs. Port Wardens, 12 How. 299;

Munn vs. Illinois, 94 U. S. 113;

Minn. Rate Cases, 230 U. S. 352, 400, 402, 409;

German Al. Ins. Co. vs. Lewis, 233 U. S. 389, 414;

Pac. Mail S. S. Co. vs. Joliffe, 2 Wall. 450, 459;

Anderson vs. Pac. Coast S. S. Co., 225 U. S. 187, 195.

In *Budd vs. New York,* 143 U. S. 517, involving a state statute regulating the business of elevating grain, by means of floating as well as stationary elevators, where such floating elevators were boats,

some of them scows which had no motive power, but the majority of them propellers, this court held the statute within the police powers of the state, and that under it those carrying on that business occupied a relation to the community analagous to that of common carriers which might be controlled by public legislation.

The state was within its police powers in imposing upon a tug towing for hire the obligation of an insurer.

Brass vs. N. D., 153 U. S. 391, 404, 405;

Martins vs. P. & L. E. R. Co., 203 U. S. 284, 294.

(c) Was not in conflict with our treaty obligations with Great Britain; Convention of Commerce and Navigation, concluded July 3, 1815, 8 St. L. 28, providing, Article I., that:

> " * * * The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes, to all such places, ports and rivers, in the territories aforesaid, to which foreigners are permitted to come, * * * and, generally, the merchants and traders of each nation respectively shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively." 8 St. L. 228.

The Kensington, 183 U. S. 263;

Knott vs. Botany Worsted Mills, 179 U. S. 69.

The foreign tug was bound to know the law within the sphere of its operations.

The China, 7 Wall. 53.

There was no burden laid upon commerce by the Act of 1880; the burden of insurer was already present prior to the passage of that act, and rested upon the towed vessel; that act merely shifted the burden from the tow to the tug.

That the petitioner was doing a towing business for hire in the District of Alaska, within the meaning of the Oregon Act of 1880, the following testimony shows:

Dawe, the mate of the tug, testified that in that capacity on that tug he had made thirty round trips in the waters of Southeastern Alaska, through Revillagigedo Channel, the channel bordering on Mary Island where the barge went ashore, during 1915, 1916 and 1917, when the tug was under command, respectively, of Robertson, Bjerre and Johnson. (Rec. 378, 379.) Bjerre had superintended the building of the tug (Rec. 97) and was the shore captain of petitioner (Rec. 229) for about three years Rec. 282).

Common Law: The Act of Congress, approved June 6, 1900, Ch. 786, Sec. 367, 31 St. L. 321, having

adopted and declared so much of the common law as was not inapplicable and not inconsistent with the Constitution of the United States and any laws passed or to be passed by Congress, to be the law within the District of Alaska, the tug *Commodore,* as a common carrier under the Oregon Act of 1880, extended to Alaska, could not contract to restrict its liability for negligence.

Railroad Company vs. Lockwood, 17 Wall 357;

Pilson vs. Auto Co., 67 Ore. 528, 136 Pac. 642, 645;

Wells vs. Gr. No. Ry. Co., 59 Ore. 165, 114 Pac. 92, 116 Pac. 1070.

SEVENTH POINT.

The Towage Contract, by Reason of the Unseaworthiness of the Tug—A Contributing Cause of the Disaster—Never Attacked.

Petitioner's contention is that if there was negligent performance of lookout duty, it was *mere negligence,* liability for which was exempted by the contract; that the vessel was seaworthy even if the lookout duty was negligently performed by those charged with that duty. If there was a fault it was one of navigation (Petition for Writ of Cert. p. 14).

As we have seen, the tug had a crew of thirteen

all told, consisting (outside of the engine crew standing watch and watch in the engine room, and the cook, who was confined to duties in the galley) of a pilot; a master and mate standing watch and watch; and three deck hands, two of whom stood watch and watch as helmsmen or quartermasters, and the third of whom, the "day man" walked (worked?) around the deck all day, sleeping at night unless called or "something else" (Test. Johnson, master of the tug, as witness for respondent, Rec. 207, 208, 209; Croft, Rec. 69, 79).

Petitioner contends that not only was the crew sufficient in number, but that there was an extra man; "over the full crew, more than the full crew" (Johnson, Rec. 209). The extra man was Bjerre, discharging the duties of pilot on the night of the disaster. An "extra man" would not have sufficed to make the crew sufficient in number; it would have taken two extra men, standing watch and watch, exclusive of the pilot, to station a proper lookout on the tug through the long winter nights of that northern latitude, on that voyage.

Here was a case not of neglect, but of inability, to station a lookout. The tug was undermanned from the inception of and during the entire voyage up to the time of the disaster, and unable for that

reason at any time during that voyage, from the time she picked up and took in tow the barge until the stranding of the barge on the island, to station a proper lookout, particularly at night.

And such undermanning contributed to the disaster complained of.

Circuit Justice Swayne, in *The John Fretter,* 13 Fed. Cas. No. 7342, said:

> "A crew is not competent without a lookout either on tugs or steamers."

In *The Armstrong,* 1 Brown, Adm., 130, the court said:

> "If the damage accruing can by possibility be attributed to this cause (absence of lookout) the essential allegation of a competent crew is disproved."

There was an implied warranty of seaworthiness of the tug at the commencement of the voyage and the warranty was a continuing one.

The Caledonia, 157 U. S. 124, 130;
The Edward I. Morrison, 153 U. S. 199, 210;
The Carib Prince, 170 U. S. 655;
The Irrawaddy, 171 U. S. 187, 190.

To be seaworthy the vessel "must also be provided with a crew adequate in number and competent for their duty with reference to all the

exigencies of the intended route."

The Lady Pike, 21 Wall. 1;

The Niagara vs. Cordes, 21 How. 7.

For want of a competent crew in an emergency, otherwise competent, the U. S. Circuit Court of Appeals for the Ninth Circuit in the *Pac. Mail S. S. Co.* case, 130 Fed. 76, held the vessel unseaworthy and denied limitation of liability under limitation of liability statutes.

But petitioner further contends that even if the tug were unseaworthy by reason of inadequacy of lookout and damage resulted thereby to respondent, no recovery may be had for such damage because the contract exempted the tug therefrom (Petition for Writ of Cert. p. 15).

The tug being unseaworthy, there was a breach of an implied warranty and the contract was void *ab initio.*

Stone vs. The Relampago, 23 Fed. Cas. No. 13486.

Putnam vs. Wood, 3 Mass. 481, 485.

> "The undertaking as to seaworthiness of the shipowner to the shipper is co-extensive with that of the shipper to the insurer. That rule is thus given by Parsons (1 *Marine Ins.* 367) 'Every person who proposes to any insurers to insure his ship against sea perils, dur-

> ing a certain voyage, impliedly warrants that his ship is in every respect in a suitable condition to proceed and continue on that voyage, and to encounter all common perils and dangers with safety. * * * This warranty is strictly a condition precedent to the obligation of insurance; if it be not performed, the policy does not attach; and if this condition be broken, at the inception of the risk in any way whatever and from any cause whatever, there is no contract of insurance, the policy being wholly void!"
>
> *The Caledonia*, 157 U. S. 124, 131, 134.

The towage contract never having attached and being wholly void, the parties are thrown back to the obligations and liabilities which result from an implied contract to tow.

Clark vs. U. S., 95 U. S. 539, 542.

No complaint is made by the petitioner in this court in its petition that the appellate court finding merit in respondent's case and finding the evidence defective, remanded the case to the trial court with leave to introduce further evidence. This is in accordance with the practice in admiralty.

The Mabey vs. Atkins, 10 Wall. 419;

U. S. Schr. Watchful, 6 Wall. 91;

Smith vs. Elmer E. Wood Transp. Co., 103 Fed. 685, C. C. A. 5th Cir.

CONCLUSION.

Like most collision cases, the instant case is one more of facts than of law.

The shackle was or was not seaworthy; there was or was not an abrupt turn of the tug causing a sudden and excessive strain on the towline and shackle, which abrupt turn was or was not necessitated by the tug's dangerous proximity to the land, which in turn was or was not due to the want of a proper lookout properly stationed on the tug.

Where the fact cannot be determined by mathematical demonstration, then the conclusion of fault or freedom from fault must rest upon the reasonableness of the respective theories of the parties applied to the established facts under the application of legal presumptions and burden of proof.

Petitioner has submitted a flood of authorities, many of which correctly state the law applicable to the facts of the particular case but none of which authoritatively reverse the rule in *The John G. Stevens,* in *The Syracuse,* or in *The Ariadne,* or in any other of the cases of this court cited herein. It would serve no useful purpose to review petitioner's authorities and we are content to let them speak for

themselves in their application to the facts in the case at bar.

We submit the decree of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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